(16,395.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 242.

ADELIA YOUNG, CADENIA C. YOUNG, AND DELECTA MASTON, APPELLANTS,

vs.

JENNIE AMY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH

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1 In the Supreme Court of Utah Territory.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

Statement of Facts in the Case.

This cause came up in the district court of the third judicial district of Utah Territory on an appeal from the probate court of Summit county, Utah Territory, from an order and decree of distribution of the estate of Oscar A. Amy, deceased, which consists of the property hereinafter described.

There were three classes of claimants for the property of the said Oscar A. Amy, deceased, claiming adversely each to the other.

First. Adelia Young, Cedenia C. Young, and Delecta Maston, the maternal aunts of Oscar A. Amy, represented by Le Grand Young, Esq.

Second. Jennie Amy, claiming to be the wife of Oscar A. Amy, represented by S. P. Armstrong and W. H. Dickson, Esqrs.

Third. Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark, the half brother and sisters of Oscar A. Amy, represented by Messrs. Pence & Allen.

The cause having been regularly called was tried in said district court before Hon. S. A. Merritt, presiding judge, on the 8th day of January, 1895, S. P. Armstrong and W. H. Dickson appearing as counsel for Jennie Amy, Pence & Allen appearing for Royal D. Amy *et al.*, and Le Grand Young appearing for Adelia Young *et al.*

2 In the Supreme Court of Utah Territory.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

Statement of Facts.

Findings of facts and conclusions of law made and entered by the supreme court of Utah Territory in the above-entitled action December 21, 1895, and adopted by the supreme court of the State of Utah September 21, 1896.

This cause coming on regularly to be heard, Adelia Young, Cedenia C. Young, and Delecta Maston appearing by their counsel, Le Grand Young, Esq., and Jennie Amy appearing by her attorneys, S. P. Armstrong, Esq., and W. H. Dickson, Esq., and the testimony having been examined, the case having been submitted, the court finds the following facts therefrom, to wit:

First. That said Oscar A. Amy died intestate in the county of Summit, Utah Territory, on the 26 day of May, 1891.

Second. That his estate was duly probated in the probate court of Summit county, Utah, and a decree of distribution was therein entered in favor of respondents herein, namely, Adelia Young, Cedenia C. Young, and Delecta Maston. From said order and decree Jennie Amy and also Royal D. Amy, Francis L. Jackson, Ellen

R. Smith, Mary A. Haynes, and Sabia A. Clark appealed to the district court of the third judicial district of the Territory of Utah, wherein said matter was tried *de novo*, resulting in a decree in favor of the said respondents, Adelia Young, Cedenia C. Young, and Delecta Maston. The said Jennie Amy and also Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark moved for a new trial, alleging certain errors of the court; which motion was denied; from which judgement and the order denying a new trial the said Jennie Amy *et al.* appealed to the supreme court of Utah Territory, where the cause was argued in the June term, 1895, and on December 21, 1895, the supreme court of Utah Territory reversed the order and decree of the district court and entered a judgement in favor of said Jennie Amy and
3 against the said Adelia Young, Cedenia C. Young, and Delecta Maston *et al.*, from which said judgement and decree the said Adelia Young, Cedenia C. Young, and Delecta Maston then and there gave notice of appeal to the Supreme Court of the United States from said judgement and decree made and entered by the supreme court of Utah Territory.

Third. The court finds that Lavira C. Smith, the mother of Oscar A. Amy, was the exclusive owner and occupant from about the year 1864 down to the time of her death, which occurred in 1883, January 1, of the following-described premises and property, to wit, part of lots one and two, in block seventy, plat "A," Salt Lake City survey, and bounded as follows: Commencing at a point nine and one-half feet south from the northeast corner of said lot one, thence south three rods; thence west eleven rods; thence north three rods; thence east eleven rods to the place of beginning, containing thirty-three square rods of ground, situated in Salt Lake City, county of Salt Lake, Utah Territory, of the value of $25,000.

Fourth. That on or about the year 1870 the mayor of Salt Lake City entered the land lying within the limits of Salt Lake City, within which was the foregoing-described premises and property, pursuant to act of Congress, in trust for the use and benefit of the occupants thereof.

Fifth. That the said Lavira C. Smith in her own right and as such occupant filed upon said premises and property, which was adjudicated to her in the probate court, pursuant to an act of the legislature of Utah Territory, and therefore the mayor of Salt Lake City issued to her a deed in fee-simple.

Sixth. That afterwards, on the 1st day of January, 1883, said Lavira C. Smith died intestate in Salt Lake county, Utah Territory, leaving surviving her two children, the eldest a daughter, then aged about thirty-five years, named Lavira A. Smith, by her first husband, then long since deceased; a second child, aged
4 about twenty-five years, named Oscar A. Amy, being the child of a second husband, who was long prior thereto deceased.

Seventh. That the estate of Lavira C. Smith was duly administered, and the property divided between her said two children.

Eighth. That afterwards, to wit, on the 18 day of December, 1888, the said Lavira A. Smith, daughter of said Lavira C. Smith, and half-sister of said Oscar A. Amy, deceased, died intestate, leaving no father or mother, husband or children, and no brothers or sisters of the whole blood or of the blood of the ancestor through whom the property came to her, excepting her said half-brother, Oscar A. Amy, whom she left surviving her as her sole heir.

Nineth. That Royal D. Amy *et al.* are not blood relations of either ancestor from whom the property came to Oscar A. Amy, the decedent.

Tenth. That the said Oscar A. Amy died intestate in Summit county, Utah Territory, as aforesaid, on the 26 day of May, 1891, leaving no issue, no father, no mother, no brothers or sisters of the whole blood or of the blood of the ancestors through whom the property came to him, and no uncles, but leaving surviving him his said three maternal aunts, the sisters of his said mother, namely, Adelia Young, Cedenia C. Young, and Delecta Maston, and the said Jennie Amy, appellant herein, whom this court now finds to be his surviving widow.

Eleventh. The court further finds that the said Jennie Amy was married to one Elliot Butterworth in 1875.

That on the third day of September, 1879, the probate court of Washington county made and entered a decree of divorce, dissolving the bonds of matrimony theretofore existing between the said Jennie Amy and the said Elliot Butterworth, and absolutely releasing the said Jennie Amy and the said Elliot Butterworth from all the obligations of said marriage; that the said probate court so granting said decree of divorce was a court of competent jurisdiction and had jurisdiction of the subject-matter of said divorce action and of both the parties thereto.

That the said defendant therein, Elliot Butterworth, had knowledge at the time of the said divorce proceedings and was duly served with process in said action.

That the said Elliott Butterworth married a second wife on the 11th day of October, 1880, being the year after said decree of divorce was rendered; that his second wife is still living, and she and the said Elliot Butterworth are still husband and wife; that as the issue of said second marriage the said Elliot Butterworth and his present wife have seven children, ranging from two years to fifteen years old.

That afterwards, to wit, on April 4, 1886, the said Jennie Amy, the claimant in this proceeding to the estate of the said Oscar A. Amy, deceased, was duly and lawfully married to the said Oscar A. Amy, and continued to be and was his lawful wife at the time of his death.

That the said Jennie Amy is now the widow of said Oscar A. Amy, deceased, and as such widow she is the successor to the whole of his estate, consisting of the property hereinabove described.

The foregoing is a statement of the facts found upon the evidence in the case, and the following are the rulings of the court on the admission and the rejection of the evidence, which was duly ex-

cepted to by counsel for Adelia Young, Cedenia C. Young, and Delecta Maston:

6 Mrs. JENNIE AMY, called and sworn in her own behalf, testified as follows:

Direct examination;

My name is Mrs. Jennie Amy. I was acquainted with Oscar A. Amy, decedent, in his lifetime. I was married to Oscar A. Amy at Salt Lake City, Utah, by Judge Zane, on the fourth day of April, 1886. I received a certificate of marriage, which I gave to my attorney. It was used in the trial in the probate court, but I have been unable to find it since. I lived with Oscar A. Amy as his wife, and had two children by him; both are dead. One lived about seven months. Both died before the death of Oscar A. Amy. I was not very well acquainted with Oscar A. Amy's relatives. I was acquainted with Lavira A. Smith, a half-sister of Oscar A. Amy. She had no children living at the time of her death. She had no brothers or sisters except Oscar A. Amy, who was a half-brother. I had been married prior to my marriage to Oscar A. Amy to one Elliot Butterworth. I married Elliot Butterworth in 1875, and was about sixteen years of age at that time.

Divorce proceedings were instituted by me to obtain a divorce from said Elliot Butterworth.

Thereupon the following proceedings took place:

Mr. ARMSTRONG: I offer the complaint in the case of Jane Butterworth *vs.* Elliot Butterworth; you are familiar with it.

LE GRAND YOUNG: We object to his offering it, the record, by piecemeal.

COURT: Offer the complaint and the proceedings.

Mr. DICKSON: We offer the complaint and will show service of the summons under the complaint, and then offer the decree. If the complaint states a cause of action and one that gave the
7 court jurisdiction of the subject-matter, and the defendant was served with summons and the decree regularly entered, that is all the record we are required to offer.

Mr. PENCE: They should offer the judgement-roll. Whatever there is should be offered. There is a certified copy of the proceedings in that case.

The COURT: Offer all the proceedings in the case.

Mr. DICKSON: The only papers there are is the complaint and decree. The summons is lost. The only thing there would be for a judgement-roll in the probate court would be the complaint, summons, and decree. That is all. The only findings there are are those here in the decree itself.

Mr. PENCE: There may have been some defective service of summons. We take it the whole record should go in.

Mr. DICKSON: We will offer what we claim to be the roll.

Mr. PENCE: We have a certified copy of the proceedings.

Mr. DICKSON: That judgement-roll contains many things which is

by no means part of the judgement-roll. The summons is lost, but we can prove the service of summons, and the decree recites the service.

LE GRAND YOUNG: We do not care about the complaint, for that would be nothing without the decree, and the complaint nothing without the service of summons, but we object that it is irrelevant and immaterial.

Mr. DICKSON: The decree is as conclusive as it is in the district court.

The COURT: The probate court having jurisdiction of divorce, the statute govern- the practice, just as it governs the practice in the district court.

Mr. DICKSON: We are prepared to show by the defendant himself that he was served with the summons in that case, if there is any question about it, the decree itself having found it as a fact.

The COURT: It goes in to be argued.

8 LE GRAND YOUNG: Your honor does not accept the evidence yet.

COURT: You can argue that finally. It is not determined now.

Mr. ARMSTRONG: I offer, then, the complaint in the case of Jane Butterworth *vs.* Elliott Butterworth filed in the probate court of Washington county, Utah Territory, on the 16 day of July, 1879, and wish it marked by the reporter.

Marked "Jennie Amy's Exhibit A."

Mr. ARMSTRONG: We also offer the decree in the same case in the same court.

COURT: I receive it subject to the objection.

Marked "Jennie Amy's Exhibit B."

Q. Did your attorney see you in regard to the matter of this divorce?

A. Yes, sir.

Q. You were the plaintiff in that action and signed the complaint at that time?

A. Yes, sir.

Q. And about that time or soon after that time did you see him have any other papers?

Objected to as immaterial.

Mr. DICKSON: Did you ever see the summons in the case?

A. Yes, sir.

Objected to as immaterial.

Mr. DICKSON: There was no summons on file. We will show one was issued.

Mr. PENCE: We object to that. That is not the proper way of proving the issuance of summons. The clerk ought to be called to show the issuance of summons.

COURT: I think you ought to have the clerk here.

Mr. DICKSON: If his record is silent upon it, he would be no more competent to prove it than anybody else who had knowledge of the fact.

Mr. YOUNG: The clerk certifies that there never were any more papers than there are now.

9 COURT: I will take the evidence subject to the objection and you can argue it later in the case.

Mr. YOUNG: It is not admitted.

Mr. DICKSON: It is received subject to the objection. Let it be received, and if it is not relevant strike it out.

COURT: I will receive the evidence subject to the objection.

Mr. YOUNG: The court to decide if the evidence is relevant or irrelevant finally.

Mr. DICKSON: Yes, sir.

Mr. PENCE: This is incompetent as to whether she saw a summons or order of publication. There is a clerk here of that court, and, as we have had some three years to take depositions of witnesses in this case, we think if there was an order of publication the clerk should have been called to prove it.

Mr. DICKSON: If there was an order of publication made and the clerk did not minute it, that would not affect the jurisdiction of the court at all.

COURT: Go ahead. I will decide the relevancy of the testimony when I come to it.

Q. I show you a copy of the Silver Reef Miner, dated Wednesday, July 30, 1879, and ask you if that paper has been in your possession since that date.

A. Yes, sir.

Mr. DICKSON: This paper contains what purports to be a copy of the summons; as tending to prove there was a summons we offer it.

Mr. PENCE: We object to it as incompetent. The method of proof provided by the statute is by affidavit of the publisher.

Marked "Jennie Amy's Exhibit C."

Elliott Butterworth.

Mr. ELLIOTT BUTTERWORTH, a witness sworn on behalf of Jennie Amy, testifies as follows:

Direct examination.

10 Direct examination of ELLIOT BUTTERWORTH:

Q. What is your full name?

A. Elliot Butterworth.

Q. You are acquainted with the lady who was last on the stand?

A. Yes, sir.

Q. You were at one time married to her?

A. Yes, sir.

Q. Did the fact of her having instituted divorce proceedings against you in the probate court of Washington county, in this Territory, come to your knowledge?

A. Yes, sir.

Mr. YOUNG: We object.
COURT: Stand by the record.
Mr. DICKSON: We wish to prove the receipt of the summons by the defendant.

Q. Where were you living at the time?
A. Franklin, Idaho.
Q. Were you living in Franklin, Idaho, September, 1879?
A. Yes.
Q. Were you living there in July, 1879?
A. Yes, sir.
Q. 14th or 15th of July, 1879?
A. Yes, sir.
Q. Continuously for some time before and after those dates?
A. Yes, sir.
Q. Did you between those dates at any time, 14th day of July, 1879, and the 3rd day of September, 1879, receive a summons issued out of that court in the case of Jane Butterworth against Elliot Butterworth?

Objected to as a conclusion of law and not as the proper way of proving the service of summons.

Admitted subject to the objection.

11 Mr. PENCE: We object to it as immaterial and irrelevant.

A. Yes, sir; I received a letter from the court of Washington county.
Q. State that letter.
A. I received a letter or a summons, whatever you would call it, from the court at Washington county.
Mr. YOUNG: Where is that document?
A. I have not found it; I mislaid it at that time.

Mr. YOUNG: I object to it as utterly immaterial and improper.
Mr. PENCE: We object to such matters going in. If they go in, they are a sort of proof; if they are clearly incompetent, they ought not to be considered.

Q. Did that paper—whatever it was—did it have the name of the court on it?
A. Yes, sir.
Q. Do you remember?
A. As near as I can tell, it was like the publication in the paper.
Q. Did you receive a paper, a copy of the Silver Reef Miner, at the same time?
A. Yes, sir; I received quite a number of them.
Q. Did those papers you received contain a copy of the paper you received from the court?
A. Yes, sir.
Q. I call your attention to the Silver Reef Miner, July 30, 1879, and call your attention to an item published therein, notice No. 41, entitled Summons; in the probate court in and for Washington county, Territory of Utah; Jane Butterworth, plaintiff, *vs.* Elliott Butterworth, defendant; greeting, &c. Did you receive a paper—a

copy of the Silver Reef Miner—about the dates you speak of containing this publication?

A. Yes, sir.

Q. Now, state whether or not this paper which you say you received from the court was a copy of this matter published here.

12 A. As near as I can remember, it was.

Q. You read both at the time?

A. Yes, sir.

Q. What you received in the form of a letter, as you call it, and what you read in the paper?

A. Yes, sir.

Q. How many copies did you receive of that publication?

A. I could not tell exactly how many copies I received, but I cut out six of these copies, five of which I gave to Mr. Armstrong.

Q. You have had them ever since?

A. Yes, sir.

Q. So you received those papers—six of these papers, at least—containing this notice?

A. Not less than six; whether there was any more than that I don't remember exactly.

Q. I hand you five slips and ask whether these are the slips you cut out of the paper.

A. It was.

Mr. DICKSON: I offer these, each being a copy of the summons as published.

Received in evidence subject to objection, marked Exhibits "D," "E," "F," "G," and "H."

Q. Were the papers containing these summons, copies of the Silver Reef Miner, sent to you postage prepaid or were you a subscriber to the paper?

A. I was not a subscriber. They were sent postage prepaid.

Q. I will ask you if since the third day of September, 1879, you have married again.

A. Yes, sir.

13 Objected to as irrelevant. Received subject to objection.

Q. When were you married?

A. 1880—the 11 day of October, 1880.

Q. The following year?

A. Yes, sir.

Q. Then the wife you then took is still living?

A. Yes, sir.

Q. You and she are still husband and wife?

A. Yes, sir.

Q. Any children by the marriage?

A. Seven children.

Q. What are their ages?

A. The oldest one is 13 past and the youngest pretty near two years.

Cross-examination of ELLIOT BUTTERWORTH by Mr. PENCE:

Q. How long after your first marriage—after the divorce was granted—did you marry?

A. How long afterwards?

Q. Yes, sir.

A. It was in July or August, 1879, when I received the papers and the letter or summons, and we were married in 1880.

Q. At that time, Mr. Butterworth, you were a member of the Mormon Church, were you not?

A. Yes, sir.

Q. I will ask you, Mr. Butterworth, whether at that time, as a part of your religious belief, you did not consider it proper to marry a second time.

Objected to as immaterial.

A. No, sir.

Q. How long did you continue a member of the Mormon Church?

A. I am a member yet.

Q. Have you been a member all the time?

A. Been a member ever since.

Q. When did you cut out these slips of paper as handed in here?

A. I cut them out as the paper came to me.

Q. Why did you cut them out?

A. To preserve them.

Q. Why didn't you keep the papers themselves?

A. I do not know, I am sure. That is a question I cannot answer.

Q. How many of those papers did you receive?

A. Well, I cut six out, but I lost one with the letter. I
14 know I cut six out, for I saw them afterwards—after I cut them out.

Q. You were a witness in the trial of this case before in the probate court?

A. No. sir.

Q. Were you not a witness in the trial of the case of Jennie Amy against Oscar Amy?

A. I gave a deposition once in Salt Lake City here before——

Q. Mr. Lewis?

A. I don't know. Mr. Hall sent for me.

Q. That was in 1890, was it not?

A. I don't remember the date.

Q. Were you not interested at that time, Mr. Butterworth, in having this divorce obtained in Washington held to be valid?

A. Interested?

Q. Yes, sir.

A. Yes, sir.

Q. Quite anxious that the divorce should be declared valid?

A. Yes, sir; just as anxious as I am today.

Q. You were as familiar with the matter of this summons being sent to you then as you are now?

A. Yes, sir.

Q. This all happened in 1879 or 1880, long prior to taking of your deposition, didn't it?

A. I don't remember the date I came down here.

Q. It was three or four years ago?

A. Yes, sir; I guess it is.

Q. Why didn't you at that time call attention to the fact that such papers had been sent to you?

A. I was not asked at all.

Q. You were interested in the case to have the divorce declared legal?

A. I just simply sat like I am today, answering the questions asked of me.

Q. You say you were very desirous that the divorce should be declared legal and were anxious to do what you could to have the divorce declared valid, were you not?

A. Yes, sir; I think the divorce was legal.

Q. Why didn't you call attention, then, at the time the deposition was taken in the case in which the question of the validity of the marriage was involved that such papers had been sent to you?

A. I could not tell you why it was I didn't do it.

Q. Isn't it a fact——

15 A. It was the same day I gave Mr. Armstrong the papers.

Q. Isn't it a fact you never saw these slips of paper until within the last two years?

A. No, sir; that is not a fact.

Q. Isn't it a fact you received the papers from the claimant in this case, Jennie Amy?

A. I don't know who the papers came from. I received them by mail.

Q. Isn't it a fact you received them within the past two years from Jennie Amy and you never saw them before that time?

A. No, sir; I received these papers as they were published and took them through the month of July and August; along through there. I received the papers myself; cut them out.

Q. Can you remember the contents of that letter you say you received from somebody there?

A. As near as I can tell, it was like the summons.

Q. You may state what it contained.

A. It contained a summons.

Q. State the wording of it.

A. Oh, I could not do that. I can read it to you if that will do. I have not learned it off by heart.

Q. Can you state any part of it, the date of it?

A. Well, it was in July.

Q. The name of the clerk?

A. No; I have not studied it.

Q. Never paid much attention to it?

A. Have not paid much attention to it. I supposed it was all done in legal and lawful form and I let it go.

Q. When did you hand these papers to Mr. Armstrong?

A. I handed them to him the day I came down here before Mr. Hall.

Q. When did you say you handed them — him; the day before you came down to Hall?

A. No; the day I was here, the day I was with Hall and gave the deposition.

Q. You handed them to Armstrong at that time?

A. Yes, sir.

Q. That was in 1890?

A. I don't remember the date.

16 Q. You gave a deposition only once, did you?

A. That is all.

Q. You are quite positive of the date you handed those papers to Mr. Armstrong; that it was the same day you gave your deposition in the other case?

A. Yes, sir.

Redirect examination of Mr. BUTTERWORTH by Mr. DICKSON:

Q. Do you remember whether it was before or after you gave your deposition that you handed the paper clippings to Mr. Armstrong?

A. It was afterwards.

Q. But the same day?

A. The same day.

Mr. DICKSON: I call the attention of the court to the fact he was called by Hall, the attorney of Oscar Amy, to prove the former marriage. That was all.

It is admitted that Jennie Amy's Exhibits D, E, F, G, and H are slips, which appear to have been clipped from a newspaper; that on one side of each of said slips is printed the summons in said divorce case, being an exact duplicate copy of the summons set out in "Jennie Amy's Exhibit C" to this statement attached; that the printed matter on the reverse or opposite side of said slips is different on each slip, and also different from that on the reverse side of the copy contained in the paper which was introduced and marked "Exhibit C"—that is, while all six of the notices are the same on the side on which the summons is printed, yet no two of said notices have the same printed matter on the reverse side thereof.

It is further admitted that the notice described in section two of the act prescribing rules and regulations for the execution of the trust arising under the act of Congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," approved March 2, 1867, passed by the territorial legislature and approved February 17, 1869, was duly given according to law.

Thereupon Jennie Amy rested.

17 JENNIE AMY'S EXHIBIT A.

In the Probate Court of Washington County, Territory of Utah.

JANE BUTTERWORTH (*née* WRIGHT)
against
ELLIOT BUTTERWORTH.

The above-named plaintiff alleges and complains:

First. That the plaintiff and defendant intermarried at Virgin City, in the county of Kane, Territory of Utah, on or about the 28 day of March, A. D. 1875, and ever since have been and now are husband and wife.

Second. That the plaintiff is and has been a resident in the Territory of Utah for the period of more than one year last and is now such resident.

Third. That on or about the month of May, in the year 1876, the said defendant, disregarding the solemnity of his marriage vow, wilfully and without cause deserted and abandoned the plaintiff and neglected to support and maintain said plaintiff during the time last aforesaid and now still continues to wilfully and without cause desert and abandon said plaintiff and to live separate and apart from her without any sufficient cause or any reason and against her will and without her procurement or consent.

Wherefore the plaintiff prays for a decree of divorce, that the bonds of matrimony between herself and defendant be dissolved and she be forever freed and she be allowed to assume her surname, and for other proper relief.

JANE BUTTERWORTH,
Plaintiff in Person.

TERRITORY OF UTAH, } ss:
County of Washington, }

Jane Butterworth, being duly sworn, says she is the above-named plaintiff; that she has heard read the foregoing complaint and knows the contents thereof, and the same is true of her own knowledge, except those parts stated upon information and belief, and as to those parts she believes it to be true.

JANE BUTTERWORTH.

Subscribed and sworn to before me this 14 day of July, A. D. 1879.

JOS. T. WILKINSON,
J. P., Leeds Precinct.

S. C. PERRIN,
Attorney for Plaintiff.

18 TERRITORY OF UTAH, } ss:
County of Washington, }

I, Seth A. Pymm, clerk of the probate court of said county, do hereby certify the foregoing to be — true, full, and correct copy of

the complaint on file in my office in the case of Butterworth *vs.* Butterworth.

As witness my hand and seal this 17 day of June, A. D. 1890.

[SEAL.] SETH A. PYMM,
Probate Clerk.

(Endorsed:) 157. In probate court, Washington county, Territory of Utah. Jane Butterworth, *née* Wright, ag't Elliot Butterworth. Comp't divorce. S. C. Perrin, att'y for pl'ff. Filed 16 day of July, A. D. 1879. A. R. Whitehead, probate clerk, per Seth A. Pymm, deputy.

19 JENNIE AMY'S EXHIBIT "B."

In the Probate Court in and for the County of Washington, Territory of Utah.

Present: Hon. John M. Macfarlane, probate judge.

JANE BUTTERWORTH, Plaintiff,
vs.
ELLIOT BUTTERWORTH, Defendant. } Decree of Divorce.

This cause having been brought on to be heard this third day of September, A. D. 1879, upon the complaint herein taken as confessed by the defendant (whose default for not answering has been duly entered), upon the proofs taken herein, from which it appears that all the material allegations of the complaint are sustained by testimony, free from all legal exceptions as to its competency, admissability, and sufficiency, that said plaintiff was a resident of this Washington county, and it also appearing to said court that said defendant was duly served with process by publication, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered:

Wherefore it is here ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested and in pursuance of the statute in such case made and provided, does order, adjudge, and decree, that the marriage between said plaintiff, Jane Butterworth, and the said defendant, Elliot Butterworth, be dissolved, and the same is hereby dissolved accordingly, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof.

Done in open court the 3d day of September, 1879.

JOHN M. MACFARLANE,
Judge of said Probate Court.

20 TERRITORY OF UTAH, } ss:
County of Washington, }

I, Seth A. Pymm, clerk of the probate court of said county, hereby certify the foregoing to be a true, full, and correct copy of

decree of divorce in the case of Butterworth *vs.* Butterworth, as shown on the records of the probate court of said county.

Witness my hand and seal this 23 day of June, A. D. 1891.

SETH A. PYMM,
Probate Clerk.

21 JENNIE AMY'S EXHIBIT "C."

Jennie Amy's Exhibit "C" consists of a copy of the "Silver Reef Miner," a semi-weekly newspaper, published Wednesdays and Saturdays at Silver Reef, Washington county, Utah, dated the 30 July, 1879, in which newspaper is contained a publication of summons as follows:

Summons.

In the Probate Court in and for Washington County, Territory of Utah.

JANE BUTTERWORTH, Plaintiff,
vs.
ELLIOT BUTTERWORTH, Defendant.

The People of the Territory of Utah to Elliot Butterworth, Greeting:

You are hereby summoned to appear in an action brought against you by the above-named Jane Butterworth, plaintiff, in the probate court in and for the county of Washington and Territory of Utah, and answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons if served within this county, and if served out of this county, but within the district, within twenty days, otherwise within forty days, or judgement by default will be taken against you according to the prayer of said complaint and the proofs to be adduced therein.

This action is brought to obtain a decree dissolving the bonds of matrimony existing between said plaintiff and defendant on the grounds set forth in the complaint on file in my office, and if you fail to appear and answer the said complaint, as required, plaintiff will take default against you and apply to the court for the relief prayed for.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 16 day of July, A. D. 1879.

[SEAL.] A. R. WHITEHEAD,
Clerk of Probate Court.
SETH A. PYMM, *Deputy.*

Jy-19-46-law.

Jennie Amy's Exhibits D, E, F, G, and H are clippings from different issues of said Silver Reef Miner containing the publication of summons identical with the summons as shown by the said Jennie Amy's Exhibit "C."

22 Pence & Allen, on behalf of Royal D. Amy *et al.*, offered in evidence the certified copy of the record of the probate

court of Washington county in the matter of the action of Butterworth *v.* Butterworth, a copy of which is hereto attached and marked "Royal D. Amy's Exhibit 4."

Mr. Dickson, on behalf of Jennie Amy, objected to the introduction of that part of the document offered consisting of the affidavit of S. C. Perrin, filed in the probate court July 16, 1879, and the affidavit of Edward Pike, filed in the probate court September 2, 1879, on the ground that they are not part of the judgement-roll and are incompetent, irrelevant, and immaterial; also that part immediately following the said affidavit of said Pike, entitled as follows:

"In the probate court in and for the county of Washington, Territory of Utah, September 3, 1879. Present: McFarland, judge, and A. R. Whitehead, clerk. Jane Butterworth *v.* Elliot Butterworth. In divorce.

"This cause having been brought on to be heard," etc., down to the title of the court and cause again entitling the decree of divorce in said action, on the ground that the same is only the minutes of the court and not part of the judgement-roll, and incompetent, immaterial, and irrelevant.

Mr. Young objected to the whole pretended record on the ground that the same is incompetent, immaterial, and irrelevant.

The said record was received, subject to the final rulings of the court.

23 ROYAL D. AMY'S EXHIBIT 4.

In the Probate Court of Washington County, Territory of Utah.

JANE BUTTERWORTH (*née* WRIGHT)
against
ELLIOT BUTTERWORTH.

The above-named plaintiff alleges and complains:

First. That the plaintiff and defendant intermarried at Virgin City, in the county of Kane, Territory of Utah, on or about the 28 day of March, A. D. 1875, and ever since have been and now are husband and wife.

Second. That the plaintiff is and has been a resident in the Territory of Utah for the period of more than one year last and is now such resident.

Third. That on or about the month of May, in the year 1876, the said defendant, disregarding the solemnity of his marriage vow, wilfully and without cause deserted and abandoned the plaintiff and neglected to support and maintain said plaintiff during the time last aforesaid and now still continues to wilfully and without cause desert and abandon said plaintiff and to live separate and apart from her without any sufficient cause or any reason and against her will and without her procurement or consent.

Wherefore the plaintiff prays for a decree of divorce, that the bonds of matrimony between herself and defendant be dissolved

and she be forever freed, and she be allowed to assume her surname, and for other proper relief.

JANE BUTTERWORTH,
Plaintiff in Person.

TERRITORY OF UTAH, }
County of Washington, } ss:

Jane Butterworth, being duly sworn, says she is the above-named plaintiff; that she has heard read the foregoing complaint and knows the contents thereof, and the same is true of her own knowledge, except those parts stated upon information and belief, and as to those parts she believes it to be true.

JANE BUTTERWORTH.

Subscribed and sworn to before me this 14 day of July, A. D. 1879.

JOS. T. WILKINSON,
J. P., Leeds Precinct.

S. C. PERRIN,
Attorney for Plaintiff.

24 (Endorsed:) 157. In probate court, Washington county, Territory of Utah. Jane Butterworth, *née* Wright, ag't Elliot Butterworth. Comp't divorce. S. C. Perrin, att'y for pl'ff. Filed 16 day of July, A. D. 1879. A. R. Whitehead, probate clerk, per Seth A. Pymm, deputy.

25 In the Probate Court, Washington County, Territory of Utah—John M. Macfarlane, P. J.

JANE BUTTERWORTH }
vs.
ELLIOT BUTTERWORTH. }

Plaintiff, Jane Butterworth, by her attorney, S. C. Perrin, being duly sworn, says that the def'd't in the above-entitle- action is a non-resident of this Territory, and that when last heard from his residence was in Franklin, Oneida county, Idaho Territory; that service of summons in the above-entitled action cannot be made, and prays the court that such service be made by publication in a newspaper in this county, as by law provided.

S. C. PERRIN, *Att'y.*

Subscribed and sworn to before me this 16 day of July, A. D. 1879.

JOHN M. MACFARLANE,
Probate Judge.

Filed the 16 day of July, A. D. 1879.

A. R. WHITEHEAD,
Probate Clerk,
Per SETH A. PYMM, *Dep.*

TERRITORY OF UTAH, } ss:
Washington County, }

In the Probate Court, Washington County—John M. Macfarlane, P. J.

JANE BUTTERWORTH, Plaintiff, }
vs.
ELLIOT BUTTERWORTH, Defendant. }

Edward Pike, being first duly sworn, upon his oath says that he is the editor and proprietor of a certain paper published in the above-named county and Territory called the Silver Reef Miner, and that he has within the last forty days forwarded to the defendant four different copies of the above-named paper at four several times containing summons in the above-entitled action, and that said summons was a copy of the same issued by the clerk of the probate court of Washington county, Territory of Utah, and that the same was addressed to the defendant in the above-entitled action at Franklin, Idaho Territory.

EDWARD PIKE.

26 Subscribed and sworn to before me this second day of September, A. D. 1879.

FRANK X. LOUGHERY,
Notary Public.

(Endorsed:) Affidavit. Butterworth *vs.* Butterworth. Divorce. Filed September 3d, 1879. A. R. Whitehead, probate clerk.

In the Probate Court in and for the County of Washington, Territory of Utah, September 3d, 1879.

Present: Hon. John M. Macfarlane, judge, and A. R. Whitehead, clerk.

JANE BUTTERWORTH }
vs. } In Divorce.
ELLIOT BUTTERWORTH. }

This cause having been brought to be heard this third day of September, A. D. 1879, on the complaint filed July 16, 1879—

Affidavit of Edward Pike, editor of the Silver Reef Miner, presented as proof of publication of summons filed, stating therein that four different copies had been forwarded to the defendant in the above-entitled action, and his default having been entered up, the court proceeded to hear the evidence for the plaintiff.

Plaintiff appeared in person and by her attorney, S. C. Perrin.

Mr. LUMAN WRIGHT and JANE BUTTERWORTH sworn:

Jane Butterworth says she has not lived with defendant as his wife for 3 years; says he has never done anything to support her; he left without her consent; witness has considered this county as

her residence for over one year; that she has applied for this divorce to be able to support herself.

Luman Wright says he has been acquainted with plaintiff and defendant for nearly four years since their marriage; never knew defendant to furnish anything for the support of the plaintiff; knows the plaintiff to have been a resident of Leeds, in this county, for over one year.

Counsel for plaintiff moved for a decree of divorce. The court, having duly considered its judgement to be rendered herein, ordered that a decree of divorce be entered as follows, to wit:

27 In the Probate Court in and for the County of Washington, Territory of Utah.

Present: Hon. John M. Macfarlane, probate judge.

JANE BUTTERWORTH, Plaintiff,
vs.
ELLIOT BUTTERWORTH, Defendant. } Decree of Divorce.

This cause having been brought on to be heard this third day of September, A. D. 1879, upon the complaint herein taken as confessed by the defendant (whose default for not answering has been duly entered) upon the proofs taken herein, from which it appears that all the material allegations of the complaint are sustained by testimony, free from all legal exceptions as to its competency, admissability, and sufficiency; that said plaintiff was a resident of this Washington county, and it also appearing to said court that said defendant was duly served with process by publication and all and singular the law and premises being by the court here seen, heard, understood, and fully considered:

Wherefore it is here ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested and in pursuance of the statute in such case made and provided, does order, adjudge, and decree, that the marriage between said plaintiff, Jane Butterworth, and the said defendant, Elliot Butterworth, be dissolved, and the same is hereby dissolved accordingly, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof.

Done in open court the 3d day of September, 1879.

JOHN M. MACFARLANE,
Judge of said Probate Court.

28 *Washington County Probate Court Docket.*

No. of suit.	Name- of parties.	Title of suit.	Attorney for pl't'ff.
157	Jane Butterworth *vs.* Elliot Butterworth.	Divorce.....	S. C. Perrin.

Att'y for def'd't.	Time of trial.	Process.	Return.	Judgement.
	Sept. 3, 1879	July 16, 1879, summons sent for publication. S. R. Miner.	Default..	Rendered for plaintiff Sept. 3, 1879.

29 TERRITORY OF UTAH, } *ss:*
County of Washington, }

I, Seth A. Pymm, clerk of the probate court of said county, do hereby certify that the foregoing copies of complaint, affidavit of non-residence, affidavit of publication, minutes of court, decree of divorce, and docket are full, true, and correct copies of the original papers on file of the record, and also of the docket entry in said cause, and that said copies constitute the whole record in said cause. I further certify that I was deputy clerk at the time said cause was pending, and that the foregoing are all the papers which are filed in said cause.

Witness my hand and official seal this 28th day of August, A. D. 1891.

[SEAL.] SETH A. PYMM,
Probate Clerk.

TERRITORY OF UTAH, }
County of Washington, }

I, Francis L. Daggett, judge of the probate court of said Washington county, do certify that Seth A. Pymm is the duly qualified and acting clerk of said court.

Witness my hand and the seal of said court this 28th day of August, A. D. 1891.

[SEAL.] FRANCIS L. DAGGETT,
Probate Judge.

30 It is hereby stipulated that the said exhibits of Jennie Amy, A, B, C, D, E, F, G, and H, including the oral testimony of Jennie Amy and Elliot Butterworth, in regard to the alleged divorce, and the said Exhibit 4 of Royal D. Amy, were duly excepted to at the time of the trial of said cause in the district court of the third judicial district, Utah Territory, and the same were taken and allowed subject to final argument of counsel and adjudication of the court; and it is further stipulated and agreed that Jennie Amy and Jane Butterworth are one and the same person.

31 In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

The court having taken certain testimony, subject to objection of counsel for Adelia Young *et al.*, now makes the following rulings on said testimony:

1. That the exhibits marked "Jennie Amy's Exhibits A, B, and C," upon examination and argument, were not allowed by the court, and the objection of said attorney to the same was and is duly sustained, and exception duly taken to the ruling of the court by Mr. Armstrong, attorney for Jennie Amy.

2. The testimony of Elliot Butterworth in regard to the receipt by him of a certain notice in a paper called the Silver Reef Miner and offered in evidence by Jennie Amy, marked "Jennie Amy's Exhibits D, E, F, G, and H," were ruled out, and the objection of Le Grand Young, attorney for Adelia Young *et al.*, was duly sustained; to which ruling Mr. Armstrong, attorney for Jennie Amy, duly excepted.

3. All the oral testimony offered by Jennie Amy in support of the alleged divorce between herself and Elliot Butterworth is stricken out, and the objection to the same by the attorneys for Adelia Young *et al.* and Royal D. Amy *et al.* are sustained; to which exception was duly taken by Mr. Armstrong, attorney for Jennie Amy.

4. The objection of Le Grand Young, attorney for Adelia Young *et al.*, to the exhibits marked "Royal D. Amy's Exhibit 4" was duly sustained; to which ruling Pence & Allen, attorneys for Royal D. Amy *et al.*, excepted.

The attorneys for Jennie Amy duly excepted to the ruling of the court in refusing to admit that portion of said document which was not objected to by Mr. Dickson on behalf of Jennie Amy.

32 That upon said record the district court entered judgement in favor of the said Adelia Young, Cedenia C. Young, and Delecta Maston denying the claim of Jennie Amy to be the widow of the said Oscar A. Amy, deceased, and denying the claim of Royal D. Amy *et al.*

That a motion was made for a new trial by Jennie Amy and also by Royal D. Amy *et al.*, which motions were denied, and an appeal from said order and from the judgement entered by said district court was duly taken to the supreme court of Utah Territory.

That the motion by Jennie Amy for new trial was made upon the following specification of errors assigned by Jennie Amy:

Specification of Particulars in which the Evidence is Insufficient to Sustain the Findings and Decisions of the Court.

1st. Those portions of the sixth finding of the court which find that the said Oscar A. Amy died leaving no wife, and that Jennie Amy was never legally divorced from Elliot Butterworth, her husband by a prior marriage, are not sustained by the evidence for

the reason that the evidence shows that a valid decree of divorce was rendered by the probate court of Washington county, Utah, in 1879, prior to her marriage with said Oscar A. Amy, which dissolved the marriage between the said Jennie Amy and the said Elliot Butterworth, and that at the time of the death of the said Oscar A. Amy said Jennie Amy was his lawful wife.

Errors in Law.

1st. The court erred in its conclusions of law that Jennie Amy "was never legally divorced from her former husband, Butterworth;" that the "probate court of Washington county never obtained jurisdiction of defendant Butterworth in said divorce proceedings," and that the said Jennie Amy was not the legal wife of said Oscar A. Amy at the time of his death.

2nd. The court erred in its second conclusion of law that the property passes to the next of kin instead of to Jennie Amy,
33 the lawful widow of the deceased.

3rd. The court erred in its third conclusion of law that the said Adelia Young, Cedenia C. Young, and Delecta Maston are entitled to said premises and property, and that the said widow, Jennie Amy, is not entitled thereto.

4th. The court erred in refusing to admit the judgement-roll in the divorce case of Butterworth *v.* Butterworth from the probate court of Washington county, marked "Jennie Amy's Exhibits A, B, and C," and in sustaining the objection thereto (the said judgement-roll showing that a valid decree of divorce was rendered in said probate court, dissolving the marriage of the said Jennie Amy (Jane Butterworth) with the said Elliot Butterworth).

5th. The court erred in excluding the testimony of Elliot Butterworth in regard to the notices clipped from the "Silver Reef Miner," a newspaper, and offered in evidence by Jennie Amy, marked "Jennie Amy's Exhibits D, E, F, G, and H," the said testimony tending to show that summons was duly issued and served by publication according to law in the said divorce case.

6th. The court erred in excluding the testimony of Jennie Amy in support of said divorce, the said testimony being offered to identify the plaintiff in said divorce case and to show that the said Jennie Amy was such plaintiff, and also to show that summons was duly issued in said divorce case.

7th. The court erred in refusing to allow Jennie Amy to prove, by the record in said divorce case in said probate court and by her own testimony and by the testimony of said Elliot Butterworth, that she was divorced from her former marriage with Elliot Butterworth.

That upon the record thus made the supreme court of Utah reversed the judgement and order of the district court and entered judgement in favor of Jennie Amy, holding that she was lawfully divorced from the said Elliot Butterworth, and that she was
34 the lawful widow of Oscar A. Amy, deceased.

From this decree of the supreme court of the Territory of

Utah Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark refused to appeal.

From said decree and judgement said Adelia Young, Cedenia C. Young, and Delecta Maston gave notice and have taken an appeal to the Supreme Court of the United States, making the following assignment of errors:

1. The supreme court of Utah erred. in admitting and considering the evidence of Jennie Amy's Exhibit A.

2. Said court erred in admitting and considering Jennie Amy's Exhibit B.

3. Said court erred in admitting and considering Jennie Amy's Exhibit C.

4. Said court erred in admitting and considering all three of said exhibits together.

5. Said court erred in admitting and considering Jennie Amy's Exhibit D.

6. Said court erred in admitting and considering Jennie Amy's Exhibit E.

7. Said court erred in admitting and considering Jennie Amy's Exhibit F.

8. Said court erred in admitting and considering Jennie Amy's Exhibit G.

9. The court erred in admitting and considering Jennie Amy's Exhibit H.

10. The said court erred in admitting the oral testimony of Jennie Amy in proof of her alleged divorce.

11. The court erred in admitting and considering the oral testimony of Elliot Butterworth in support of said divorce.

12. Said court erred in rendering judgement in favor of Jennie Amy and against said Adelia Young *et al.*

35 13. The said court erred in holding that the burden of proof was on Adelia Young *et al.* to show that said pretended judgement of divorce was void.

14. The said court erred in holding that said pretended judgement in the probate court of Washington county cannot be attacked collaterally in an action of this sort.

15. The said court erred in holding that Jennie Amy was lawfully divorced from Elliot Butterworth by the proceedings in the probate court of Washington county.

16. The said court erred in deciding in favor of Jennie Amy that she was the widow of Oscar A. Amy, deceased.

17. The said court erred in holding it was collaterally attacking the alleged divorce of Jane Butterworth, or Jennie Amy, for the reason that she, like any other person claiming to be the heir of Oscar A. Amy, was bound to show her right to inherit, and the burden of proof was on her to show this.

18. The court erred in holding that Adelia Young *et al.* could not question said divorce proceedings when introduced in evidence by Jane Butterworth, *re* Jennie Amy, and in holding that it was collaterally attacking said pretended divorce proceedings by requiring

her to affirmatively show her legal right to inherit the property of Oscar A. Amy, deceased.

19. The said court erred in admitting the evidence "Exhibit 4" of Royal D. Amy *et al.* or any part of said pretended record.

20. The said court erred in holding that the affidavit of the publisher of the Silver Reef Miner was sufficient.

21. The said court erred in holding that it was not necessary that there should be an order of the court directing publication.

22. The said court erred in holding that the only papers necessary in proof of publication were the complaint, summons, and affidavit of the printer, and judgement.

36 23. The said court erred in holding that said probate court prior to 1874 or ever possessed common-law or chancery jurisdiction.

24. The said court erred in holding that the said probate court of Washington county, Territory of Utah, was a court of general jurisdiction.

Wherefore Adelia Young, Cedenia C. Young, and Delecta Maston pray that said judgement and decree of the supreme court of Utah Territory be reversed and judgement entered in their favor.

LE GRAND YOUNG,
Attorney for Adelia Young, Cedenia C. Young, and Delecta Maston.

37 In the Supreme Court of the State of Utah, Regular June Term.

DECEMBER 21, 1895.

In the Matter of the Estate of OSCAR A. AMY, Deceased; JENNIE AMY, Appellant,
vs.
ROYAL D. AMY *et al.*, Appellants, and ADELIA YOUNG *et al.*, Respondents.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court herein be, and the same is hereby, reversed, and the cause remanded to said lower court, with directions to enter a decree in favor of the appellant, Jennie Amy, awarding her the entire estate of the decedent.

38 In the Supreme Court of the State of Utah, Regular June Term.

DECEMBER 21, 1895.

In the Matter of the Estate of OSCAR A. AMY, Deceased; JENNIE AMY, Appellant,
v.
ROYAL D. AMY *et al.*, Appellants, and ADELIA YOUNG, CEDENIA C. YOUNG, and DELECTA MASTON, Respondents.

In this cause motion having been made by Mr. Le Grand Young, counsel for respondents Adelia Young, Cedenia C. Young, and Delecta

Maston, that an appeal be allowed to the Supreme Court of the United States from that portion of the judgment of this court which awards the entire property of the deceased to Jennie Amy, and that the amount of the bond for costs to be given on such appeal be now fixed, it is ordered that the appeal as prayed for be, and the same is hereby, allowed, and the bond for costs is fixed in the sum of five hundred dollars ($500.00).

39 In the Supreme Court of the Ty. of Utah.

supreme court.

Appeal from the third judicial district court.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

Undertaking on Appeal.

Know all men by these presents that we, John H. White, Oscar W. Moyle, and Le Grand Young, of the city and county of Salt Lake, Territory of Utah, are held and firmly bound unto the clerk of the Supreme Court of the United States in the full and just sum of five hundred dollars, current money of the United States, to be paid to the clerk, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally by these presents.

Sealed with our seals and dated this thirty-first day of December, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a session of the supreme court of Utah Territory, in a suit pending in said court between Cedenia C. Young, Adelia Young, Delecta Maston, Jennie Amy, Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, Sabra A. Clark, in the matter of the estate of Oscar A. Amy, deceased, a decree was rendered against the said Cedenia C. Young, Adelia Young, Delecta Maston, Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabra A. Clark, and in favor of Jennie Amy,

40 and the said Cedenia C. Young, Adelia Young, and Delecta Maston having obtained an order to remove the said cause to the Supreme Court of the United States and filed a transcrip- of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the aforesaid suit:

Now, the condition of the above obligation is such if the said obligors shall well and truly pay or cause to be paid to the said clerk of the Supreme Court of the United States, his heirs, executors, administrators, or assigns, all such sums as shall accrue to him, the said clerk as aforesaid, and charged to the said appellants in the prosecution of said appeal, then the above obligation to be void; otherwise to be and remain in full force and virtue.

JOHN H. WHITE. [SEAL.]
LE GRAND YOUNG. [SEAL.]
OSKAR W. MOYLE. [SEAL.]

Signed, sealed, and delivered in presence of—

—— ——.

I, chief justice of the supreme court of Utah Territory, do hereby certify that the within-named obligors are known to me to be perfectly good and responsible for the within-named amount.

MERRITT,
Chief Justice.

Marked: No. 602. Jennie Amy *v.* R. D. Amy, Adelia Young, *et al.* Bond for costs on appeal to Supreme Court U. S. Filed Dec. 31, 1895. Ledyard M. Bailey, clerk supreme court, Utah.

41 STATE OF UTAH, } *ss:*
County of Salt Lake, }

Le Grand Young, being duly sworn, on his oath does say that he is acquainted with the market value of real property in Salt Lake City, and has been so acquainted for at least twenty years last past; that he is familiar with that pi-ce of property in controversy between Adelia Young, Cedenia C. Young, and Delecta Maston, on the one part, and Jennie Amy, on the other part, and described as follows, to wit, part of lots one and two, in block seventy, plat "A," Salt Lake City survey, and bounded as follows: Commencing at a point forty-nine and one-half feet south from the northeast corner of said lot one; thence south three rods; thence west eleven rods; thence north three rods; thence east eleven rods to the place of beginning, containing thirty-three square rods of ground, situated in the city and county of Salt Lake, State of Utah; that said property was, in 1891, of the value of $25,000, and is now of the value of at least $12,500.

LE GRAND YOUNG.

Subscribed and sworn to before me this 14th day of September, 1896.

[Seal of Ben W. Driggs, Jr., Salt Lake County, Utah, Notary Public.]

BEN W. DRIGGS, JR.,
Notary Public.

42 TERRITORY OF UTAH, }
County of Salt Lake. }

In the Supreme Court of the Territory of Utah.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

This is to certify that the foregoing papers constitute a statement of the facts in the case in the matter of the estate of Oscar A. Amy, deceased, decided in the supreme court of Utah Territory, December 21, 1895, on appeal from the district court of the third judicial district, Utah Territory, and that the foregoing statement includes the rulings of the court in the admission or rejection of evidence, which was excepted to.

I further certify that the following papers constitute a transcript of the proceedings, including the judgement and decree of said supreme court.

Sept. 21, 1896.

SAM'L A. MERRITT,
Late Chief Justice of the Supreme Court of Utah Territory.

43 UNITED STATES OF AMERICA, *ss:*

To Jennie Amy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within sixty days from the date of this citation, pursuant to an appeal allowed by the supreme court of the Territory of Utah, wherein Adelia Young, Cedenia C. Young, and Delecta Maston are the appellants and you, the said Jennie Amy, are the respondent, to show cause, if any there be, why the judgment and decree rendered in the said supreme court on the 21st day of December, 1895, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Charles S. Zane, chief justice of the supreme court of the State of Utah, this 21st day of September, A. D. 1896.

C. S. ZANE,
Chief Justice of the State of Utah.

Attest: —— ——,
Clerk Supreme Court of Utah.

Service of a copy of the above citation is hereby admitted this 21st day of September, A. D. 1896.

S. P. ARMSTRONG,
Attorney for Respondent.

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4 *Findings of Fact and Conclusions of Law.*

11720.

In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

This is a case that comes up on appeal from the probate court of Summit county, Utah Territory, C. O. Whitemore, the surviving administrator of the estate of Oscar A. Amy, deceased, appearing in person; Pence & Allen, attorneys-at-law, appearing for Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark, and Jennie Amy appearing by her attorneys, Messrs. S. P. Armstrong and W. H. Dickson; Adelia Young, Cedenia C. Young, and Delecta Maston appearing by their counsel, Le Grand Young, and all the parties having appeared in the case, and testimony having been taken, and the matter having been submitted to the court, and the court having been fully advised in the premises, now finds the following facts and conclusions of law:

1. That Lavira C. Smith in her lifetime and at the date of her death was the owner in fee-simple of the following-described premises and property, to wit: Part of lots one and two, in block seventy, plat "A," Salt Lake City survey, and bounded as follows: Com-

mencing at a point forty-nine and one-half feet south from the northeast corner of said lot one, thence south three rods, thence west eleven rods, thence north three rods, thence east eleven rods to the place of beginning, containing thirty-three square rods of ground, with the tenements and appurtenances, situated in Salt Lake county, Utah Territory.

2. That on the 1st day of January, 1893, the said Lavira C. Smith died intestate in Salt Lake City, Utah, leaving surviving her two children, the first and eldest a daughter of the name of Lavira A. Smith, by one Samuel Smith, deceased, and the second a son by the name of Oscar A. Amy, the aforesaid intestate, by one Dustin Amy.

3. That her estate was duly administered and the said property of the said deceased, Lavira C. Smith, was distributed equally between her said children, share and share alike.

4. That afterwards, to wit, on the 18 day of December, 1888, the said Lavira A. Smith, the daughter of the said Lavira C. Smith, died intestate, and, so far as appears from the records in this case, leaving no father or mother, husband or children, and no brothers or sisters of the whole blood, but leaving her surviving the said Oscar A. Amy, her half-brother and son of her mother, and several other half brothers and sisters, the children of her father by another wife.

5. The said Oscar A. Amy took possession of said premises and property belonging to his said half-sister and occupied the same during his lifetime, and that letters of administration were taken out upon the estate of said Lavira A. Smith, deceased, but said estate is not yet settled, but is in course of administration.

6. Said Oscar A. Amy died intestate in the county of Summit, Territory of Utah, on the 26 day of May, 1891, leaving no issue, no wife, father, mother, brother, or sister of the whole blood and no uncles, but leaving him surviving three maternal aunts or sisters of his mother, namely, Adelia Young, Cedenia C. Young, and Delecta Maston; also brothers and sisters of the half blood, the children of Dustin Amy, father of the said deceased, Oscar A. Amy, by a former wife, which said half brothers' and sisters' names are as follows, to wit, Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark, and *Sabia A. Clark, and* that the applicant, Jennie Amy, claims to be the widow of said deceased, Oscar A. Amy; but the court finds that said Jennie Amy was heretofore and prior to her alleged marriage to Oscar A. Amy, deceased, married to one Elliot Butterworth, from whom she was never legally divorced.

7. That the said Lavira C. Smith at the time of her death had five sisters, all of whom survived her, two of whom, namely, Merinda Kimball and Hulda Ballantyne, died long prior to the death of said Oscar A. Amy, and that only three of the sisters of the said Lavira C. Smith, to wit, the said Adelia Young, Cedenia C. Young, and Delecta Maston, survived the said Oscar A. Amy.

Conclusions of Law from the Foregoing Findings of Facts.

First. That the property having descended to the said Oscar A. Amy from his mother and sister, all of those who are not the blood of such ancestor and the kindred of the said Oscar A. Amy, deceased, are excluded from the inheritance.

Second. That said Oscar A. Amy leaving no father or mother, wife or issue, the property passes to the next of kin, who are the blood of the ancestors from whom it came and who are the next of kin in that line to said deceased.

Third. That the said Adelia Young, Cedenia C. Young, and Delecta Maston being the blood of the ancestor, who are also the next of kin in that line to the said Oscar A. Amy, deceased, they are entitled to said premises and property in equal degree, and a decree shall be entered accordingly.

February 9, 1895.

MERRITT, *Judge.*

Attest:

[SEAL.] DAVID C. DUNBAR, *Clerk,*
By GEO. D. LOOMIS, *Deputy.*

(Endorsed:) Filed Feb. 19, 1895. David C. Dunbar, clerk, by Geo. D. Loomis, deputy.

7 *Decree.*

11720.

In the District Court of the Third Judicial District, Territory of Utah, County of Salt Lake.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

This case came on regular- for trial on the — day of January, 1895, C. O. Whittemore, the surviving administrator of the estate of Oscar A. Amy, deceased, appearing in person; Pence & Allen appearing for Royal D. Amy, Francis L. Jackson, Ellen R. Smith, Mary A. Haynes, and Sabia A. Clark, and Jennie Amy appearing by her attorneys, Messrs. S. P. Armstrong and W. H. Dickson; Adelia Young, Cedenia C. Young, and Delecta Maston appearing by their counsel, Le Grand Young. The case was tried on appeal from the probate court of Summit county, Utah Territory, before the court sitting without a jury. The witnesses were examined and testimony taken in behalf of all the parties hereto, and, the evidence being closed, the case was submitted to the court for consideration and decision, and after due deliberation thereon the court delivered its findings of facts and conclusions of law in writing, which are filed, and has ordered that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that Adelia Young, Cedenia C. Young, and Delecta Maston are the lawful owners and claimants

and entitled to the possession of the estate, premises, and property owned by the late Oscar A. Amy, deceased, and the same is hereby awarded and distributed to them in equal portions; which said property is described as follows, to wit: Part of lots one and two, in block seventy, plat "A," Salt Lake City survey, and bounded as follows: Commencing at a point forty-nine and one-half feet south from the northeast corner of said lot one, thence south three rods, thence west eleven rods, thence north three rods, thence east eleven rods to the place of beginning, containing thirty-three square
8–72 rods of ground, together with the tenements and appurtenances thereunto belonging, and situated in Salt Lake county, Utah Territory.

Done in open court this 9th day of February, 1895.

MERRITT,
Judge of said District Court.

Attest:
[SEAL.] DAVID C. DUNBAR, *Clerk*,
By GEO. D. LOOMIS, *Deputy.*

Indorsed: Filed Feb. 19, 1895. David C. Dunbar, clerk, by Geo. D. Loomis, deputy.

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73 In the Supreme Court of Utah Territory.

In the Matter of the Estate of OSCAR A. AMY, Deceased.

Opinion of the Court.

KING, *J.:*

From the record before us it appears that Dustin Amy was married to Leonora Scott Amy, by whom he had several children, who are known herein as Royal D. Amy *et al.* Subsequently he married Lavira C. Smith, widow of Samuel Smith, who bore him one child, the decedent herein; that said Lavira C. Smith-Amy had one child, Lavira A. Smith, by her first marriage; that in 1883 said Lavira C. Smith-Amy died, leaving surviving her as her only heirs (her husband being dead) Oscar A. Amy and Lavira A. Smith, and by order of the probate court of Salt Lake county her estate was distributed in December, 1888, to her said heirs. Two days later Lavira A. Smith died intestate, leaving surviving her no children nor father nor mother. In April, 1886, Oscar A. Amy married Jennie Amy, and in May, 1889, he died intestate, without issue, leaving surviving him the said Jennie Amy, who claims his estate as his widow, and his half brothers and sisters, named herein as Royal D. Amy *et al.*, and his aunts, Adelia Young, Cedenia C. Young, and Delecta Maston, sisters of his deceased mother. The estate left by decedent consists of valuable property in Salt Lake City, and in the probate court Jennie Amy petitioned for the distribution of the entire estate to her, alleging that she was his wife and sole heir; that he died leaving no brothers or sisters of the whole blood, the blood of the mother of said decedent; that the property of which he died

seised was inherited by him from his mother and was originally acquired and owned by her. Adelia Young *et al.* also prayed for a distribution of the estate, representing that they were the maternal aunts of the deceased and his only heirs, and averring that Jennie Amy was not the widow of the deceased. Royal D. Amy *et al.* alleged in their petition for distribution that they were the sole
74 heirs of deceased; that the estate was originally acquired and owned by Dustin Amy, and that it came by devise from him to said deceased. They also denied that Jennie Amy was decedent's widow. The probate court distributed all the estate to Adelia Young *et al.*, and appeal was had therefrom to the district court, where the judgement of the probate court was affirmed.

The questions presented for our consideration are: (1.) Was Jennie Amy lawfully divorced from her first husband, Elliot Butterworth? (2.) Did the estate come from decedent's father or mother? (3.) If the divorce was valid, is Jennie Amy the sole heir of decedent or do his half brothers and sisters share in the estate?

1. In support of her contention that she was the sole heir of deceased and had been lawfully divorced from her former husband Jennie Amy testified that she was married to deceased in 1886 and lived with him as his wife until his death. During this period she bore him two children, both of whom died prior to his decease; that in 1876 she married one Elliot Butterworth, and thereafter was divorced from him. Elliot Butterworth testified that he was married to Jennie Amy, and that when she instituted divorce proceedings he was a resident of Franklin, Idaho; that he received a summons from the probate court and also at least six copies, each of a different issue, of the Silver Reef Miner, a newspaper containing a copy of the summons, and that he cut the notices out (five of which witness produced in court). He also stated that he believed the divorce to be valid, and the following year married again, and had lived with his wife continuously until the present; that she had borne him seven children. The original complaint, duly verified, and which charged desertion upon the part of the defendant in that action, together with a decree of the court rendered in the case, were offered, and also a copy of the Silver Reef Miner of the issue of July 30, 1879, showing publication of service in due form. Counsel for Royal D. Amy *et al.* and Adelia Young *et al.* objected, claiming, among other things, that they were
75 incompetent, because the record showed no affidavit or order of publication and no proof of service of summons. The proceedings of the probate court showed that the attorney for plaintiff filed an affidavit averring that defendant, Elliot Butterworth, was a non-resident of Utah; that his last known place of residence was Franklin, Idaho, and prayed for service by publication. The affidavit of publication was made by the publisher of the Silver Reef Miner, and stated that "he has within the last forty days forwarded to the defendant four different copies of the above-named paper, at four several times, containing summons in the above-entitled action, and that said summons was a copy of the same issued by the clerk of the probate court of Washington county, Territory of Utah, and

that the same was addressed to the defendant in the above-entitled action at Franklin, Idaho Territory." A certified copy of the minutes of the probate court showed that the case was heard September 3, 1879, and that the affidavit of the publisher was presented as "proof of publication of summons;" that plaintiff appeared in person and by her attorney and offered testimony, and that the court ordered a decree to be entered for plaintiff. Attached to a certified copy of the minutes was the certificate of the clerk "that the foregoing are all the papers which are filed in said cause." Counsel for Jennie Amy objected to the introduction of any of the papers in said cause excepting the complaint and decree of divorce, and counsel for the other parties objected to any of the papers being received. The court finally sustained the latter's objection, holding that the statute relating to publication of summons had not been followed and that the divorce was invalid.

Did the court have jurisdiction to render the decree in the case? This involves the question of what is sufficient to constitute substituted service. The statute of Utah in force at that time provided that when the fact of non-residence shall appear by affidavit to the satisfaction of the court, and it shall in like manner appear
76 that a cause of action exists against the defendant, or that he is a necessary party to the action, the court may grant an order that the service be made by publication of summons, and the order shall direct the publication to be made in some newspaper, to be designated, as most likely to give notice to the person to be served. Proof of service shall be the affidavit of the publisher showing the same and an affidavit showing deposit of a copy of a summons in the post-office, if the same shall have been deposited. The publication shall be inserted four times consecutively, the first insertion being at least forty days before the time for answer, and a copy of which shall be immediately deposited, postage prepaid, in the post-office, directed to defendant at his last known place of residence or business.

The decree rendered in the cause contains a recital of due service of process by publication upon the defendant; and the appellant, Jennie Amy, contends that the probate court is a court of record, and in this collateral proceeding the judgement therein rendered cannot be impeached; that the record imports verity, and that any of the papers which may be found in the files cannot be received to contradict the recital of due service. Respondents claim that when jurisdiction is to be obtained by publication against a non-resident there is no presumption in favor of the record, and jurisdiction does not attach unless the statute is strictly followed. It becomes necessary to determine whether the probate court was a court of superior or general jurisdiction. Prior to 1874, under various acts of the legislature, the probate courts possessed common-law and chancery jurisdiction and authority to try and determine crimin*la* cases. While many of these enactments conferring this jurisdiction upon such courts were unconstitutional, they indicate the purpose of the legislature to treat them as courts of general jurisdiction. By the Poland bill they were shorn of all civil, chancery, and criminal

jurisdiction excepting in divorce proceedings. From the earliest history of the Territory these courts have exercised jurisdic-
77 tion in divorce cases, and, though Congress stripped them of powers theretofore exercised, it did not deprive them of jurisdiction in this class of cases until 1887. They were courts having a seal, clerk, and kept records of their proceedings, and the general procedure act governing district courts was applicable to them Orders and writs were issued by the clerk under the seal of the court. This, we think, constituted them courts of record. Vassault *v.* Austin, 36 Cal., 696; McCauley *v.* Fulton, 44 Cal., 360; Robinson *v.* Fair, 123 U. S., 87; 9 Sup. Ct., 30; Van Fleet, Coll. Attack, 814–827.

It is often stated that the presumption- of law are in favor of the jurisdiction and of the regular proceedings of superior courts—of courts of general jurisdiction proceeding according to the course of the common law; but this statement does not aid us much in determining what are courts of general jurisdiction. The term "general jurisdiction" would imply unlimited powers, but we have no courts of unlimited powers in this Territory. A court of record, proceeding according to the regular ordinary course of proceeding of the territorial jurisdiction, and whose judgements may be reviewed by writs of error or appeal, is a court whose proceedings and judgements import verity, and until reversed will protect those obeying them. Mere special tribunals, created for some special or temporary purpose, governed by some special rule or proceeding, are not courts of record and cannot claim such immunities for their judgements or acts. "The true line of demarcation between courts whose decisions are conclusive if not reversed and those whose proceedings are nul-ities if the jurisdiction does not appear on their face is this: A court which is competent by its constitution to decide on its own jurisdiction and to exercise it to a final judgement without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity and not to be impugned by averment or proof to the contrary, is of the first description. There can be no judicial inspection behind the judge-
78 ment save by appellate power." Grignon *v.* Astor, 2 How., 341; Borden *v.* State, 54 Am. Dec., 221.

The probate court had the power to hear and determine the class of cases confided to it by the legislature, and it is not saying too much to aver that courts dealing with divorce proceedings and the settlement of estates of deceased persons, at least so far as their effect on property rights and social relations are concerned, are as important as any courts with which we have to deal. We think that every principle of justice dictates that the same presumption should attach to their proceedings as other courts. For the repose of titles, the security of property, and the interests of the public a rule should be adopted which would render secure from collateral attack their proceedings. At any rate, we see no good reason why a different rule should be applied to their judgements than governs decrees of district courts. In one view the probate court had unlimited jurisdiction over divorce cases. It is true such cases could

be removed to the district court or, after final judgement, an appeal would lie, but it had jurisdiction to render a final decree and judgement. "The word 'limited' seems to be used sometimes carelessly instead of the term 'special,' for I take the true distinction between courts to be such as possess a general and such as have only a special jurisdiction for a particular purpose or clothed with special powers for the performance of special duties, beyond which they have no manner of authority, and those special powers to be exercised in a summary way, either by a tribunal already existing for general purposes or else by persons appointed or to be appointed in some definite form. Some tribunals with special powers for adjudication in particular cases under the various names of 'commissioners,' 'surveyers,' 'appraisers,' 'committees,' 'contractors,' 'overseers,' and the like abound in our statute books, little or in nowise relating to the general administration of justice, whose modes of proceeding are prescribed by the statute by which they are erected, and unless their proceedings on the face of them show a compliance with
79 the directions required by the statute under which they act it never could be known whether they acted within their jurisdiction or exceeded it." Obert *v.* Hammel, 18 N. J. Law, 73.

Counsel for respondents concede that the probate court, at the time this decree was rendered, was a court of general jurisdiction in matters pertaining to the guardianship of minors and the administration of estates of decedents, but, as we understand his position, in dealing with divorce cases it was a court of special or limited jurisdiction. We see no good reason for holding it to be an inferior court while adjudicating questions of equally as much, if not greater, importance, while its proceedings were being conducted in conformity with the general practice prevailing in courts of superior jurisdiction. Because by special enactment jurisdiction is conferred upon a tribunal it does not necessarily follow that such tribunal thereby becomes one of special or limited jurisdiction. In many of the States there has been special legislation regarding the subject of divorce. Indeed, the subject has been taken from ecclesiastical courts, and in some jurisdictions the legislatures have been prohibited from granting divorces. In other words, by special legislation the authority to determine the matrimonial status has been referred to certain courts; but, because of this character of legislation, we do not think the courts exercising the jurisdiction conferred are of special or limited jurisdiction and the judgements rendered therein entitled to different presumptions than followed in determining other cases. The distinction is obvious between conferring jurisdiction over a new subject-matter or a class of cases to be conducted in the manner prescribed in the ordinary course of procedure of the court and in conferring on the court special powers to be exercised in a special manner. The case relied on so strongly by respondents seems to recognize this principle: "When the special powers conferred are brought into action according to the course of that law (common law) and chancery proceedings by regular process
80 and personal service where a personal judgement or decree is asked or by seizure or attachment of the property where a

judgement *in rem* is sought, the same presumption of jurisdiction will usually attend the judgement of the court as in cases falling within its general powers."

Galpin *v.* Page, 18 Wall., 371.

Regarding probate courts as courts of general jurisdiction the question that naturally suggests itself is, What presumptions attend such courts? And, first, it is to be observed that probate courts had jurisdiction to determine materimonial status of persons. It had jurisdiction of the subject-matter. Being a court of competent jurisdiction, its judgement cannot be treated as a nullity, even though there be irregular process until reversed, "for there is no principle better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done until the contrary appears. This rule applies as well to any judgement or decree rendered in the various stages of their proceedings from their initiation to their completion as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of the record, which thenceforth proves itself without referring to the evidence in which it has been adjudged." Voorhees *v.* Bank, 10 Pet., 472. The supreme court of North Carolina, in an opinion by Chief Justice Ruffin, speaking of a title based on attachment and garnishment against an absconding debtor, says that "the general rule has not been questioned by defendant's counsel that a judgement of a court having jurisdiction of the subject-matter and proceeding according to the course of the common law * * * cannot be collaterally impeached, but until it be set aside by the same court or reversed in a superior tribunal is conclusive. Such is unquestionably the rule of the law. The reason is the judgement itself is an evidence of the right determined in it or debt recovered, and is evidence so high that a denial of the right can only be made in the form of an appeal denying the existence of the record
81 alleged. * * * But we are not aware of any instance in which the subject-matter is within the jurisdiction and a cause is once constituted in a court of record that the judgement is not conclusive between the parties or any other plea admissible except *nul tiel* record, and that without regard to the process by which the action was commenced."

Skinner *v.* Moore, 30 Am. Dec., 155.

After determining that the court has jurisdiction of the subject-matter, the next inquiry is, Did it have jurisdiction of the person? In collateral proceedings this question can only be determined by an inspection of the record. If it is silent, then the presumption follows that what ought to have been done was not only done, but rightly done. In a collateral attack the omission to affirm the jurisdictional fact upon the record will be supplied by the presumption that the court acted with due authority, and its judgement will be as valid as though any fact necessary to jurisdiction affirmatively appeared. But the record in this case is not silent upon this jurisdictional question. The decree of the court recites, among other

things, "that the cause came on regularly for hearing, and that it appeared to the court that said defendant was duly served with process by publication." These findings are as conclusive upon all parties in a collateral proceeding as any adjudication of the court can be. It must be presumed that they were supported by sufficient testimony not set forth in the record. "Thus, though the return of the summons against A B certifies a service of the summons upon C D and the judgement states that A B has been summoned, the record is not necessarily contradictory. The error in the service of process may have been corrected by service of summons on the proper persons, and, since statement to this effect is made by the court, it will be presumed that it acted upon ample evidence and with due deliberation before making such statement, and the judgement will be impregnable to any collateral assault." 1 Freem., Judgm., 130. Mr. Freeman further states that a finding or a recital showing that the court had jurisdiction is, in the
82 vast majority of the States, not disputable when a judgement based thereon is drawn in question collaterally. Accordingly it has been held that the fact that summons served by publication omitted the name of one of the defendants, to whom property had been assessed, was not fatal to the decree, because, from the recital of due service, it was conclusively presumed that the court had sufficient proof of service, though the judgement-roll failed to disclose it. Reily *v.* Lancaster, 39 Cal., 354; Branson *v.* Caruthers, 49 Cal., 375. And a recital in proceedings by an administrator to sell land that proof was made "of the service of notice according to provisions of the statute" was held sufficient against collateral attack. Bowen *v.* Bond, 80 Ill., 351. A recital that "due notice has been given to the defendant" cannot be contradicted in a collateral action. Richards *v.* Skiff, 8 Ohio St., 586. And, where a probate record of the final settlement of an administrator showed personal appearance of all the heirs by name, they were not allowed to contradict it in a collateral proceeding. Hardy *v.* Gholson, 26 Miss., 70; Van Fleet, Coll. Attack, 479. In Brickhouse *v.* Sutton (N. C), 5 S. E., 380, the court says: "Every intendment is in favor of the action of the court and its sufficiency. The ascertainment and recital of facts in the record by the court imports verity and binding effect, and must be so treated for all proper purposes of the action till, in some proper way, the action of the court shall be successfully impeached. Thus, in this case, it must be taken that the court, acting upon proper evidence, ascertained and set forth in the record the important fact that the defendants in the proceeding in question were served with process against them—that is, served regularly and effectually;" and in Goodell *v.* Starr, 127 Ind., 200; 26 N. E., 793, the court follows the decision just referred to and states that "the case of Quarl *v.* Abbett (Ind. Sup.), 1 N. E., 476 (and others cited), laydown that which we regard as the correct rule on that subject. When notice is given by publication the judgement of the court, acting upon such notice, that the publication and the affidavit upon which
83 it is based are sufficient to give it jurisdiction is conclusive upon all the parties as against a collateral attack;" and in

the case of Goodwin *v.* Sims (Ala.), 5 South., 587, it is stated that "the rule deducible from these decisions is that when the court, by the recitals in the decree, ascertains the jurisdictional fact such adjudication is final and conclusive when the decree is collaterally assailed; and, if the decree is silent, the jurisdictional fact may appear from other parts of the record. As the entire record imports absolute verity, the recitals in the decree may be explained, limited, or qualified by other parts of the record. The entire record may be looked to for the purpose of ascertaining the jurisdictional facts, when there is no finding by the court, for jurisdiction is acquired from the facts as they appear in the entire record, but when the power to ascertain the jurisdictional fact is conferred on the court and the court adjudges that it has jurisdiction it is not overcome or destroyed because other parts of the record may not be sufficient to uphold such finding. "1 Black, Judgm., 273, 274, 278; 1 Freem., Judgm., 126, 132; Hall *v.* Law, 102 U. S., 464: Adams *v.* Cowles (Mo. Sup.), 8. S. W., 711; Kinney *v.* Lewis, 2 Utah, 517; Callen *v.* Ellison, 13 Ohio St., 454; Shawhan *v.* Loffer, 24 Iowa, 226; Nash *v.* Church, 10 Wis., 244; Blasdel *v.* Kean, 8 Nev., 308; Davis *v.* Robinson, 70 Tex, 397; 7 S. W., 749; Waterhouse *v.* Cousins, 40 Me., 333.

Respondents contend, however, that the recitals in the decree are contradicted by other papers appearing in the record. In order to determine what papers are a part of the record reference must be made to the compiled laws of 1876. The law in question did not require the filing of the affidavit or order of publication. Section 1428 provides that "immediately after entering the judgement the clerk shall attach together and file the following papers, which shall constitute the judgement-roll: The complaint. the summons, with the affidavit of proof of service, and a copy of the judgement."

It has been held repeatedly in California that proof of service
84 does not include the affidavit or order of publication. Sharp *v.* Daugney, 33 Cal., 512; Hahn *v.* Kelley, 34 Cal., 404; Quivey *v.* Porter, 37 Cal., 464. We adopted the statute just referred to from California with this construction, and will therefore follow the interpretation placed upon it by the California courts. People *v.* Ritchie (Utah), 42 Pac., 209; Suth. St. Const., 256. By amendment the affidavit and order of publication are now required to be made part of the judgement-roll. The affidavit for publication and the order of the court issuing thereon not being a part of the judgement-roll, the court will not look into the record to ascertain whether or not they were properly made or filed. Their absence from the files of the cause is immaterial and cannot be proved to overcome the presumption of regularity. In Hahn *v.* Kelly, *supra*, the affidavit and order of publication were offered for the purpose of contradicting the presumption of legal service on which judgement had been rendered, but the court say: "So, for the purpose of determining whether the want of jurisdiction is shown by the record, we can only look to the summons, the affidavit of the printer, the complaint with the default indorsed thereon, and the judgement. The affidavit, made for the purpose of obtaining an order for publi-

cation, and the order of the court directing publication, for all the purposes of the question before us, must be disregarded, or, in other words, presumed to have been all that the law requires." See Harvey *v.* Tyler, 2 Wall., 344; Hall *v.* Law, 102 U. S., 463; Applegate *v.* Mining Co., 117 U.S., 269; 6 Sup. Ct., 742; Estate of Newman, 75 Cal., 213; 16 Pac., 887. We again quote from Hahn *v.* Kelly: "We consider the true rule to be that the legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. Where the record is silent as to what was done it will be presumed that what ought to have been done was not only done, but rightly done. If the record merely shows that a summons was served on the son of defendant it will not be presumed that it was served on the defendant. If
the affidavit of the printer shows that the summons was
85 published one month, it will not be presumed that it was
published three. To avoid any misapprehension, we deem it proper to add that so far we have assumed, for the purposes of the argument, that the record, aside from that portion of it which is denominated the 'proof of service,' is silent upon the question of service; but it may happen that other portions of the record may also speak upon that question. If so, what they say is not to be disregarded. On the contrary, in determining the question whether a want of jurisdiction is apparent upon the face of the record we must look to the whole of it, and report the responses of all its parts. To illustrate: Suppose that portion of the judgement-roll denominated the 'affidavit of proof of service' shows that personal service was made upon the son of defendant and the remainder of the record says nothing about service, we then have a want of jurisdiction appearing upon the face of the record; but suppose the judgement states that the defendant appeared, or that personal service was made upon him, or something else that is equivalent, as it frequently does, the opposite result follows, for the record cannot lie, and it appears that the father as well as the son had been served, which may well have been the case. * * * So in a case of service by publication, if the affidavit of the printer states that the summons was published one month and yet the court, in its judgement, states that it was published three, or that service has been had upon defendant, it will be presumed that other proof than that contained in the judgement-roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it."

We think that the court, having found judicially that service was legally made upon the defendant Butterworth, in this collateral proceeding recourse could not be had to the files in the case aside from the judgement-roll, and that no evidence would be admissible other than that contained in the judgement-roll *dehors* the recital
in the judgement. The question then arises, Is there anything
86 in the affidavit of publication contradictory of the recitals in
the decree? We think not. The affidavit of service is rather one of posting. All that is there stated is entirely consistent with the recitals in the judgement. The affiant may have mailed the

papers, as stated in the affidavit, but this affidavit does not disprove the idea that the publication was made four times consecutively, or that the first insertion was at least 40 days prior to the date for answer. The affidavit is not proof that the only publication was as stated therein. There may have been other affidavits showing publication in four consecutive issues of the paper, and that the first publication was at least 40 days before the time for answer. This affidavit is silent upon these points, and, as stated in the opinion from which we have just quoted, if the affidavit of the printer states that the summons was published one month, and yet the court in its judgement states that it was published three, it will be presumed that proof other than that contained in the judgement-roll was made. Indeed, from the testimony of Butterworth it is quite apparent that the affidavit did not contain a statement of all that did actually occur with reference to the publication of the summons.

We think there was nothing in the judgement-roll contradicting the recitals in the judgement, and that the absence of the order of the court for publication in no manner vitiated the decree rendered in the case; and it is to be noted here that, notwithstanding the certificate of the clerk that the papers above referred to were the only ones filed in the cause, there was nothing requiring the filing of the order of publication, and the certificate is not incompatible with the presumption of the existence of such order duly made by the court. The case of Colt *v.* Haven, 30 Conn., 195, is instructive upon this question. Service was constructive, as appears from the return of the officer, the writ having been left at defendant's house. The language of the judgement was: "This action came to the present term of this court." The parties against whom it was presented, in
87 opposition to the record, for the purpose of showing that the judgement was void, offered to prove by defendant in the judgement and others that at the time when the copy of the writ was left in service by the officer, as claimed, at his usual place of abode he was an not inhabitant of the town or of any place in the State, and that the writ never was in any way served, and that at the time it was claimed to have been served he was residing out of the State. This testimony was rejected. The court say: "But counsel for defendant urged the extreme hardship to which a party may be subjected if he may not deny and disprove the service of the writ when he can clearly show in fact no service was ever made on him, and that he never had notice of the suit in any form, and never heard of the judgement against him until it was made the ground of an action." They say with great emphasis, and the argument is certainly a forcible one: "Can it be that the clerk of the court may fabricate a record or an officer make a false return of service and yet there be no escape for one who is thus, by a judgement in a suit, made heavily indebted or found guilty of a wrong, when in fact he is perfectly innocent and never owed the debt, and could show it clearly if he had a chance." * * * "It is so necessary that confidence should be reposed in courts of a high character, as well as the records of such courts, that on the whole, and in view of

all the considerations affecting the subject, it is the only safe rule to give the decisions of courts of general jurisdiction full effect so long as they remain in force rather than to leave them open to attack in every way and on all occasions. Being domestic judgements, they can, if erroneous, be reviewed by proceedings instituted directly for the purpose and reversed on error by new trial, and, if the danger is e-minent and special, relief can be temporarily if not finally obtained by application to a court of equity. * * * Any other rule with regard to judgements of such courts would be attended with great embarrassment and would be very dangerous in its general operation. The general good clearly requires and has therefore
88 established the rule that domestic judgements of courts of general jurisdiction cannot be attacked collaterally." In Illinois it was held that where a decree recited due and legal process had been made and the process found in the record was issued three terms before and showed a defective service, it was presumed that another process had been issued and served, as the time had been sufficient within which to do it. Mulvey *v.* Gibbons, 87 Ill., 367. And in another case, where the summons found among the papers was returnable at the July term upon which the service was too short, the court held that that would not control a recital of service made at the August term, as the presumption was that a new writ had been issued and duly served. Mathews *v.* Hoff, 113 Ill., 95. The affidavit for publication is in the nature of evidence, and its sufficiency cannot be questioned in a collateral proceeding. Banta *v.* Wood, 32 Iowa, 469. From the service of process the court has jurisdiction, and, because of some irregularity or defect in the service, ordinarily the judgement would not be void. In the case of Sargent *v.* Bank, 12 How., 378, a paper was found in the files purporting to show how notice was given of service of process, and which was contradictory of the recital in the judgement. It was held to be no part of the record and could not be received to impeach its verity. The court there say: "The real record informs us that legal and sufficient notice was given to the heirs of Samuel Sargent, but whether by this paper or by what other mode, except that it was legal and sufficient, we are not told and are not at liberty in this case to indulge in inferences against the verity of the record. It is a principle well settled, too, in judicial proceedings that whatever may be the powers of a superior court in the exercise of regular appellate jurisdiction to examine the acts of an inferior court the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not acting in the course of appellate power. To permit the
89 conve-se of this principle is to unsettle nine-tenths of the rights and titles in any community and lead to infinite confusion and wrong." In line with the expressions in Hahn *v.* Kelly it was held that when the statute provided that the affidavit of the printer or publisher "shall be sufficient evidence of publication," and the certificate of the publisher was not verified, the statute did not make the affidavit exclusive proof of service, and that, as the record contained a recital of due proof of service, the presumption was that

other proof was given. Raley *v.* Guinn, 76 Mo., 263; Sargeant *v.* Bank, 4 McLean, 339, Fed. Cas. No. 12360; Van Fleet, Coll. Attack, 835, 836.

We do not mean in this opinion to decide what defects in service would, in a collateral proceeding, be sufficient to overthrow the presumption of verity. Reference has been made more or less to authorities opposite to the general question, but the conclusions which we reach are based on the facts of this particular case and the equities presented for our consideration.

Respondents also contend, no matter what presumptions of regularity attend a judgement, if it appears that it was taken against a non-resident the presumption ceases. In support of this view, Galpin *v.* Page, 18 Wall., 365, is cited. It must be remembered that in that case there was no recital of due service of process, and the decree introduced had been reversed by the supreme court of California upon the ground that service was insufficient to give jurisdiction; also, the decree was introduced in a Federal court as a basis for relief, the granting of which, under all the circumstances, would have been inequitable and unjust. It seems from a careful reading of the case that the decree would still have been held good as to the rights of third parties having equitable interests, and that the court regarded it, at least for some purposes, as merely voidable. Even if it should be conceded that, the fact of non-residence being apparent upon the record, the presumption of verity does not attach, could it not with propriety be argued that this presumption
90 would be reinstated and entitled to its legal effect by the solemn adjudication in the decree that due service had been made? It would seem there must be a distinction between cases where the judgement is silent about service and one where it directly affirms the service as a jurisdictional fact. Many of the cases cited in respondent's brief in support of this contention present wholly different features from those existing in the case at bar. In the case of Thompson *v.* Whitman, 18 Wall., 457, a judgement which had been rendered in a special proceeding, as well as in a foreign suit, was under consideration. In the case of Noble *v.* Railroad Co., 147 U. S., 173; 13 Sup. Ct., 271, the question before the court was one of presumptions merely, and not the effect of recitals in the decree; and the case of Romaine *v.* Insurance Co., 28 Fed., 625, does not present the question of collateral attack. Cissell *v.* Pulaski Co., 10 Fed., 893, involved the question of a judgement rendered in a special proceeding.

In the case at bar the validity of a domestic judgement is involved and the question of special proceedings is not presented. In saying this we are not unmindful of the fourteenth amendment of the Constitution and the construction which has been placed upon it. Jurisdiction can be obtained by constructive service and the judgement rendered is "due process of law." The State is sovereign. It has a right to provide for bringing into its courts those whose rights are involved or for the effectual adjudication of the rights of others whose appearance may be necessary. It has the right to provide tribunals to determine the matrimonial status of persons domiciled

within its limits and such determination is a judgement *in rem*. Of course, a personal judgement cannot be rendered against a non-resident without personal service. Pennoyer *v.* Neff, 95 U. S., 714. Why in a collateral proceeding a court should attach greater inviolability to a domestic judgement rendered against a resident than one obtained against a non-resident is difficult to understand. In passing upon the questions before it its proceedings are in
91 the same general manner and according to the same general practice. In one case its judgements import verity. According to many authorities in the other case its judgements are subject to collateral impeachment and no presumptions of verity attend them. It seems folly to predicate this distinction upon the assertion that constructive service was unknown to the common law. Conceding this to be true, what follows? Our courts are creatures of statute. Their powers and their proceedings are largely determined by legislative enactment. Service of summons upon residents is provided for by statute. Perhaps no greater power was conferred upon the courts by these enactments, but a different mode of exercising an old and inherent power was pointed out. It seems to the writer of this opinion that Galpin *v.* Page is founded upon the fallacy that constructive service is in derogation of some venerated principle, and to be regarded with disfavor. The growth of civilization, the development of commerce, the establishment of business relations, the homogeneousness of the people of our si-ter States seem rather to commend this practice of obtaining jurisdiction of the person because of the necessities that arise, and the great inconvenience, not to say embarrassments, that would result if jurisdiction could only be obtained by personal service. Constructive notice was well known both to common law and chancery practice, and it is therefore a proceeding "according to the course of the common law." 3 Bl. Comm., 283, 444; 1 Freem., Judgm., 127; Hahn *v.* Kelly, 34 Cal., 417.

Why, on principle, two judgements in the same court of general jurisdiction in due form should be entitled to different presumptions respecting the verity of the record simply because one is against a non-resident where the proceeding is *in rem* is a question the proper solution of which no court has successfully attempted. Mr. Freeman says that "the tendency of modern decisions is to strengthen the position that the orders and proceedings of courts of general jurisdiction where process is constructively served are supported by the same presumptions as when the court proceeds upon per-
92 sonal service, and can no more be avoided for mere errors and irregularities than can its other orders and judgements." 1 Freem., Judgm., 127. See Fanning *v.* Krappfi, 68 Iowa, 244; 26 N. W., 133; Dowell *v.* Lahr, 97 Ind., 146; Quarl *v.* Abbett, 102 Ind., 233; 1 N. E., 476; Williams *v.* Moorehead, 33 Kan., 609; 7 Pac., 266; Williams *v.* Hudson, 93 Mo., 524; 6 S. W., 261; Stewart *v.* Anderson, 70 Tex., 588; 8 S. W., 295; Adams *v.* Cowles, 95 Mo., 501; 8 S. W., 711. "The authorities upon this side of the question have apparently received an unexpected accession from the Supreme Court of the United States. From the language employed by that tribunal

we understand it to be firmly committed to the doctrine that when it appeared that defendant was served with process by publication no jurisdictional presumption could be indulged in in favor of the judgement; but this language is now limited in its application to cases in which it does not appear that the court made any order justifying such publication. * * * On the other hand, if it is shown that the court ordered such service, its judgements are supported by the same presumption as in other cases unless the statute requires that evidence of such jurisdictional fact shall appear by record, and it does not so appear. If it (this decision) means that except as to matters which the statute has expressly required to be a part of the judgement or judgement-roll the court must always presume that jurisdiction was obtained where the record does not rebut such presumption, then this decision is an important aid to the ultimate establishment of the rule that judgements of courts based upon constructive service of process are supported by the same presumptions as if such service were personal." 1 Freem., Judgm., 127; Applegate *v.* Mining Co., 117 U. S., 255; 6 Sup. Ct., 742.

It would seem that the decision in the case of Applegate *v.* Mining Co., *supra* (especially in view of what was said in the case of Sargeant *v.* Bank, 12 How., 371, that no papers could be looked to in order to determine the sufficiency of publication but such as by statute constituted the judgement-roll), clearly announced the rule that the court will presume jurisdiction was obtained over
93 the defendant where the judgement-roll does not rebut that presumption. In Applegate *v.* Mining Co. the statute under which the proceedings resulting in the judgement in question had been conducted authorized the court to appoint a day for the absent defendants to enter their appearance in the suit and required a copy of its order to be published "in the Kentucky Gazette or Herald and continue for two months successively, and shall also be published on some Sunday immediately after devine service in such church or meeting-house as the court shall direct, and another copy shall be posted at the front door of said court-house." In support of the judgement extrinsic evidence was offered of the publication of the order in the Kentucky Gazette in nine successive weekly issues of that paper; but there was no evidence of the publication of the order in church or its posting at the front door of the court-house. The court said: "But the record contained no proof of publication and posting notice, as required by statute, and it is insisted by the defendants in this case that the record itself must show the publication and posting notice as required by law; otherwise the jurisdiction of the court does not appear, and its decree is absolutely void. While it must be conceded that in order to give the court jurisdiction over the person of the defendants all the steps pointed out by the statute to effect constructive service on non-residents were necessary, yet it does not follow that evidence that the steps were taken must appear in the record, unless, indeed, the statute expressly or by implication requires it. The court which made a decree in the case of Clark *v.* Conklin was a court of general jurisdiction; therefore every presumption not inconsistent with the record is to be

indulged in in favor of its jurisdiction. * * * It is to be presumed that the court before making this decree took care to see that its orders for constructive service, on which its right to make the decree depended, had been obeyed. That this presumption is authorized will clearly appear by the following cases:

In Harvey *v.* Tyler, 2 Wll., 328, the court stated: 'The juris-
94 diction which is now exercised by the common-law courts in this country is in a very large proportion dependent upon special statutes conferring it. * * * In all cases where the new powers thus conferred are to be brought into action in the usual form of common law or chancery proceedings we apprehend there can be little doubt that the same presumptions as to the jurisdiction of the court and the conclusiveness of its action will be made as in cases falling more strictly within the usual powers of the court.' In Hall *v.* Law, *supra*, the validity of the partition in lands made by a circuit court of the State of Indiana was attacked. This court said: 'All that the statute designates as necessary to authorize the court to act is that there should be an application for the partition by one or more adjoining proprietors after giving notice of the intended application in a public newspaper for at least four weeks. When application is made the court must consider whether it is a proper party, whether it is sufficient in form and substance, and whether the requisite notice has been given as prescribed. Its order made thereon is an adjudication on these matters.' The case of Voorhees *v.* Bank, 10 Pet., 449, was an action of ejectment, and the case turned on the validity of a sale of the premises in controversy under a judgement of the court of common pleas of Hamilton county, Ohio, in a case of foreign attachment. The sale was attacked on the following, among other, grounds: (1) Because the statute authorizing the proceeding by foreign attachment required that an affidavit should be made and filed by the clerk before the writ issued, and no affidavit was found in the record; (2) because the statute directed three months' notice to be given by publication in a newspaper of the issuing of the attachment before judgement should be entered, and also required 15 days' notice of the sale to be given, neither of which appeared by the record to have been done; (3) because the statute required that the defendant should be put in
95 default at each of the three terms preceding the judgement and the default entered of record, but no entry was made of the default at the last of the three terms. But the court overruled the objections and sustained the validity of the judgement of the sale. It said: 'But the provisions of the law do not prescribe what shall be deemed evidence that such acts have been done or direct that their performance shall appear on the record. * * * This leaves the question open to the application of those general principles of law by which the validity of sales made under judicial process must be tested, in the ascertainment of which we do not think it necessary to examine the record in the attachment for evidence that the acts alleged to have been omitted appear therein to have been done.'" The court announces, as a result of these opinions, that "where a court of general jurisdiction is authorized in a

proceeding, either statutory or at law or in equity, to bring in, by publication or other substituted service, non-resident defendants interested in or having a lien upon the property lying within its territorial jurisdiction, but is not required to place proof of service upon the record, and the court orders such substitutive service, it will be presumed, in favor of the jurisdiction, that service was made as ordered, although no evidence thereof appears of record, and the judgement of the court, so far as it affects such property, will be valid." See Grignon *v.* Astor, 2 How., 319; Lessee of Boswell *v.* Sharp, 15 Ohio, 447; Van Fleet, Coll. Attack, 388–396, 834; Essig *v.* Lower (Ind. Sup.), 21 N. E., 1090.

From these authorities it would seem that judgements rendered against non-residents were entitled to the same presumptions as in cases of personal service. The case of Galpin *v.* Page seems to be at variance with the cases just cited and has been substantially overruled, although this is denied by the court in the case of Applegate *v.* Mining Co. The rule announced in the case just cited and in Hahn *v.* Kelley is, we think, for the best interest of the public generally and essential for the security and repose of titles to
96 property as personal rights. Accordingly we are of the opinion (*a*) that the affidavit upon application for order of publication and the order based thereon, under the Compiled Laws of 1876, are not a part of the record, and their existence or non-existence cannot be appealed to in this collateral attack to impeach the verity of the record; (*b*) that, the recital of service of process not being contradicted by anything appearing in the judgement-roll, the presumption is that the court acquired jurisdiction of the defendant, and in this collateral proceeding the decree of divorce there rendered is unassailable and conclusive.

In reaching these conclusions we have in mind the rule that collateral assaults upon judgements are not favored unless it clearly appears that the court had no jurisdiction or transcended the same, and especially when the equities are upon the side of the party attempting to uphold the validity of the decree. Head *v.* Daniels, 38 Kan., 12; 15 Pac., 911; Gemmell *v.* Rice, 13 Minn., 406 (Gil., 371); Ogden *v.* Walters, 12 Kan., 235.

Plaintiff was an actual and *bona fide* resident of the Territory. The marriage between her and Elliot Butterworth, by reason of his non-residence, had ceased to be of any practical effect. The court had authority to determine the status of the plaintiff. It was a proceeding *in rem*. No property rights or children were concerned and no personal judgement was prayed for. Notice to the defendant was not a natural right, but he was entitled to it only by reason of the statute. Borden *v.* State, *supra*. He received notice of the proceedings. If process was irregular or the notice defective, he could have appeared and contested the proceedings. Even if the judgement were erroneous, it is invulnerable in this attack. Pettiford *v.* Zoellner, 45 Mich., 362; 8 N. W., 57; Estate of Newman, 75 Cal., 220; 16 Pac., 887. He was not misled or prejudiced. He regarded the decree as valid and contracted new relations.
97 The plaintiff in good faith married the deceased. Both accepted the decree of the court as valid. Neither one could

question its validity. They had acquiesced in it and had validated it, even if it were invalid. Crosby *v.* Probate Court, 3 Utah, 52; 5 Pac., 552; Pettiford *v.* Zoellner, *supra;* Colton *v.* Rupert, 60 Mich., 329; 27 N. W., 520; Hendrick *v.* Whittemore, 105 Mass., 26; Arthur *v.* Israel, 15 Colo., 147; 25 Pac., 81. After so great a lapse of time and in view of the new relations contracted since, the court ought to indulge in any reasonable presumption that would give validity to the decree and determine that the parties were duly separated and the new relations were not criminal and meretricious. Wilson *v.* Holt, 83 Ala., 540; 3 South., 321; 1 Bish. Mar., Div., and Sep., 77, 956–958, 1148, 1149; Carroll *v.* Carroll, 20 Tex., 741.

Sound reasons of public policy would dictate the upholding of the decree where there have been subsequent marriages, children born, and property acquired, especially when the court had jurisdiction of the subject-matter, and when the only contention is that process was defective, though defendant had actual notice of the proceedings and was not prejudiced in any manner. If neither can question the validity of the decree, if both are estopped, what principle of justice in the case would permit third parties to do so? This case was tried in a court of equity. We cannot see why, when the defendant is not complaining of any wrong done, and when in fact no wrong was done and no fraud perpetrated in procuring the divorce, and he had full knowledge of the proceedings, some third party in a collateral proceeding can question the judgement because of defective process. It is a matter of common knowledge that in many of the proceedings of probate courts in this Territory there have been informalities and, perhaps, serious irregularities, but for years their adjudications have been acted upon and property rights have been acquired. Hundreds of divorces have been granted and new relations have been entered into. If we were to declare
98 this decree invalid, it would bastardize many children, disrupt families, unsettle titles, and bring litigation and trouble to many homes. We think, in addition to the reasons heretofore assigned for upholding this decree, the ones just suggested are entitled to consideration and add strength to the conclusions just reached.

2. To determine who are the heirs of the decedent it becomes necessary to ascertain the ancestor from whom the estate came. Royal D. Amy *et al.* contend that the estate descended from Dustin Amy, father of decedent, while the other parties to this controversy assert that it was originally acquired and owned by the mother of the decedent. On the trial counsel for Adelia Young *et al.* offered the declaratory statement of decedent's mother, dated January 8, 1872, directed to the probate judge of Salt Lake county, by which she claimed to be the owner and occupant of the premises in controversy and petitioned to be adjudged the occupant and owner thereof; also an order of the probate court citing all persons interested in said property to appear, and the order of the court, which it seems was not signed, reciting that "the case duly came on for hearing upon the application of the party, and upon investigation thereof, the evidence adduced, the affidavit herein filed, and the alle-

gations of the parties the court is of the opinion, and it is so ordered and adjudged, that the said Lavira C. Smith (Amy) is the original owner of (then follows the description of the premises in controversy); and it is further ordered that certificate of title issue in accordance therewith." Counsel for Royal D. Amy *et al.* objected to its admission for the reason that it was not signed by the probate judge, and for the further reason that it does not contain a finding on the evidence offered in respect to the claim of decedent's mother for the premises in question, and the record is not complete. Objection was overruled. Thereupon a deed from Daniel H. Wells, mayor of Salt Lake City, to Lavira C. Smith (Amy), dated April 28, 1873, was offered in evidence and re-
99 ceived over the objection of Royal D. Amy *et al.* Counsel for Royal D. Amy *et al.* then offered in evidence what purported to be a copy of a deed dated September 16, 1863, executed by Dustin Amy to his wife, decedent's mother, which contained the clause, "Unto the said Lavira Smith, during her natural life, and after her decease to be and become the property of Oscar A. Smith (the deceased), son of said Lavira Smith, the said property being the same that said Dustin Amy received in trade from Claud Clyde," etc. They also offered the deposition of Royal D. Amy to prove that the deed was delivered to decedent's mother, and they claim that the property was held by Mrs. Amy as trustee for the decedent, and that the property was never owned by her, but descended to decedent from his father. We do not agree with counsel in this position. At the time of the alleged deed executed by Dustin Amy he had no interest in the property which could be charged with a future estate. He could do nothing more than transfer possession by any instrument which he might execute. Buxton *v.* Traver, 130 U. S., 235; 9 Sup. Ct., 509. In the case of Whittemore *v.* Cope (Utah), 40 Pac., 256, it was claimed that because the property was the homestead of the deceased his wife (who continued to reside thereon) could not hold it adversely, and that she held only a life interest therein. The court, speaking of this claim, say: "In 1868 the land laws of the United States were extended over Utah, and the mayor's entry was made in November, 1871. * * * Thomas Cope, deceased, had no estate whatever in said lot, not even an inchoate right. He could not devise it and give title and it would not pass to his heirs. No interest that he possessed could be the foundation upon which to predicate a homestead title, and out of his naked possession no estates in life or remainder could be carved." The case of Drake *v.* Reggel (decided by this court), 37 Pac., 583, we think, is decisive on this question. In that case George Cronyn executed to his daughter a deed of the premises in controversy in 1865, conveying a life estate to her, with remainder in fee to such of her heirs as she might appoint. The court,
100 speaking to the question, say: "At the time of the execution of the Cronyn deed the grantor had no other right or title to the land than a simple possession. The land was public land of the United States, and no statute then provided for its sale. * * * The town-site act under which title was obtained was enacted March

7, 1867, and the act of the territorial legislature prescribing the necessary regulations thereunder was passed February 17, 1869. * * * The second section enacts that within thirty days after the entry of the town site by the corporate authorities they shall give a prescribed public notice thereof. Section 3 prescribes that 'within six months after the first publication of such notice each and every person * * * claiming to be the title owner or possessor, occupant or occupants, or to be entitled to the occupancy or possession of such land * * * shall file a statement in writing with the probate court of the county containing a description of the land claimed and the specific right claimed therein; * * * that all persons failing to make and deliver such statement within the time limited in this section shall be forever barred from the right of claiming or recovering such land or any interest or estate therein or any part, parcel, or share thereof in any court of law or equity.' * * * On March 26, 1872, Lizzie D. Wilson filed with the clerk of the probate court of Salt Lake county her statement describing said premises, but alleges that she is entitled to a life estate in the said piece or parcel of land, remainder to her lawful heirs, and prays that a fee-simple deed may issue to her, and further referring to the Cronyn deed and the book and date of its record as a source of her right. * * * The probate court adjudged Lizzie D. Wilson to be the lawful owner of possession of the said premises and to be entitled to a deed thereof in fee-simple. * * * But it is contended that Lizzie D. Wilson, being, as claimed, entitled to a life interest, stood in the relation of trust towards those entitled in remainder, and that the trustee having by a breach of duty acquired the title, equity will hold her as trustee for the remainder-
101 men, notwithstanding their failure to file the required statement; in other words, that, although the statute attempts to bar any one so failing from thereafter claiming any estate in any court of law or equity, there is one particular estate which such person can still claim in a court of equity. We find nothing in the statute to warrant this conclusion. In referring to a similar statute of the Territory of Colorado the Supreme Court of the United States said: 'No language could be more explicit to make the failure to deliver the statement within the time specified a bar, an absolute bar, to the recovery of the same, however strong might be the equitable claim to the land so lost.' Cofield *v.* McClelland, 16 Wall., 335. * * * In any event the legislature did not see fit to exempt trustees from the benefit of the statute, nor the owners of equitable estates from its bar; and the duty of the court is to declare the law, and not to make it. * * * Appellants, having failed to file the required statement, are precluded from recovering any estate in the premises created by the Cronyn deed and adverse to the fee-simple estate conveyed to Lizzie D. Wilson by the mayor of Salt Lake City." It was the duty of the probate judge to ascertain the question of occupancy, and his adjudication and the deed issued to decedent's mother by the mayor of Salt Lake City are conclusive in this collateral attack. Ming *v.* Foote (Mont.), 23 Pac., 515; Smelting Co. *v.* Kemp, 104 U. S., 647; Rogers *v.* Thompson, 9 Utah, 47; 33 Pac.,

234; Society *v.* Dalles, 107 U. S., 336; 2 Sup. Ct., 672; Baker *v.* Brickell (Cal.), 25 Pac., 492.

Whether or not a trust arose in favor of decedent by the deed from Dustin Amy it is not necessary for us to determine, but, under the authorities above referred to, it is clear the legal title to the premises passed to Lavira Amy by the mayor's deed, and that she is to be regarded as the person who first brought the property into the family. But if it is admitted that Dustin Amy had an equitable interest in the premises, upon the death of Lavira Amy the
102 legal estate descended to her heirs, and where the legal and equitable estate in the same land become vested in the same person the equitable will merge in the legal estate. Whyte *v.* Arthur, 17 N. J. Eq., 523; 1 Perry, Trusts, 347. In the case of Nicholson *v.* Halsey, 1 Johns. Ch., 420, it was held that the equitable estate inherited from one ancestor merged in the legal estate inherited from the other ancestor, and did not open or separate at the death of the heir, and that the course of the descent of the property which had been so inherited is to be determined by legal title. See Patterson *v.* Lamson, 45 Ohio St., 90; 12 N. E., 531; Shepard *v.* Taylor, (R. I.), 3 Atl., 383.

3. Having determined that the land in question was originally owned by the mother of Oscar A. Amy and passed by descent to decedent and Lavira A. Smith, the question then arises who are the heirs of the deceased? The statute of succession provides that if "the decedent leave no issue, the estate goes one-half to the serviving husband or wife, and the other to the decedent's mother and father in equal shares, and if either be dead the whole of said half goes to the other. If there be no father or mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased person by right of representation. If the decedent leave no issue, nor husband nor wife, the estate must go to his father and mother in equal degrees, or if either be dead then to the other. * * * If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, or sister, the whole estate goes to the surviving husband or wife." 2 Comp. Laws Utah, p. 123. Section 2749 in the same act is as follows: "Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance."

Appellants, Royal D. Amy *et al.*, claim that the statute has
103 abolished the rule prevailing at common law, viz., that half blood could not inherit, and that, though they are the half brothers and sisters of the deceased, they are heirs to his estate and inherit the entire property, unless Jennie Amy shall be considered his lawful wife, in which event they will be entitled to one-half. It is clear that unless the section last referred to is a modification or limitation of the preceding acts their position is correct. Subdivisions 5, 6, 7, and 8 of section 2741 would indicate that it was the purpose of the legislature to hold the property in the family of the

propositus, and section 2756, which enacts that if no issue be left by the deceased, nor husband nor wife, and the mother be living, the estate goes to the mother, and if the estate came to him as an advancement from his father, and he be living, such estate goes to the father, seems to look to the same result. In answer to section 2749 it is claimed that it can have no application except in cases of next of kin of the half blood and the whole blood in equal degree—that is, if the claimant be within any of the classes expressly preferred, viz., either wife, child, parent, brother, or sister. This simple fact of near relationship to the deceased is by the statute made sufficient without inquiring as to blood or the source from which the estate came. We cannot agree with counsel in the views so learnedly put forth by them nor with the decisions cited by them from 21 Mich., 229 (Ryan *v.* Andrews); 32 Mich., 70 (Rowley *v.* Stray), and 43 Wis., 167 (Kirkendall's Estate). The statute is clear and unambiguous and means precisely what the words import, that kindred of the half blood are excluded from inheriting property that descended from a line in which they are not related. The word "ancestor" as used in this connection is construed to mean the last possessor before the decedent—that is, the person from whom the land immediately descends to the decedent. The propositus of Oscar A. Amy and Lavira A. Smith was their mother, and upon the death of Lavira A. Smith her estate was inherited by the decedent herein.

C.

The estate in question "came by descent to the intestate,"
104 Oscar A. Amy, from his ancestors, Lavira C. Amy and Lavira A. Smith. Gardner *v.* Collins, 2 Pet., 89; Cutter *v.* Waddingham, 22 Mo., 264; Valentine *v.* Wetherill, 31 Barb., 660; West *v.* Williams, 15 Ark., 693; Wheeler *v.* Clutterbuck, 52 N. Y., 70; White *v.* White, 19 Ohio St., 534; note to Prescott *v.* Carr, 61 Am. Dec., 660.

Before Royal D. Amy *et al.* can inherit any portion of the estate of the decedent they must trace their blood to the propositus through whom decedent inherited the property. They cannot connect themselves in this manner with the mother of Oscar A. Amy, from whom he inherited an undivided one-half; neither can they trace their blood to his half-sister, from whom he inherited the remaining half. Perkins *v.* Simonds, 28 Wis., 90; Kelly's Heirs *v.* McGuire, 15 Ark., 588; Den *v.* Searing, 8 N. J. Law, 347; Deadrick *v.* Armour, 10 Humph., 599. The provisions of the statute under which brothers and sisters may inherit are to be construed with reference to the section precluding kindred of the half blood from inheriting estates descending from the ancestor of the decedent. Kelly's Heirs *v.* McGuire, *supra.* In the cases above cited, and particularly Kelly's Heirs *v.* McGuire and Cutter *v.* Waddingham, this question has been so exhaustively discussed and statutes similar to ours construed that we feel it would be a superfluous task to elaborate what we have said. The overwhelming weight of authority is against the views of the Michigan and Wisconsin courts, and we see no reason for departing from the rule so well nigh universal. The statute of succession was passed in 1884, and the legislature had, presumably,

before it the almost unbroken line of authorities sustaining the construction against which appellants contend. To the legislature must be committed the labor of changing the statute, if change is desirable. Under our view of the statute Jennie Amy is the sole heir of her husband.

The judgement of the lower court is reversed and the cause remanded, with directions to enter a decree in favor of the appellant Jennie Amy, awarding her the entire estate of the decedent.

Bartch, J., concurs.

105 In the Matter of the Estate of OSCAR A. AMY, Deceased.

Appeal from the supreme court of the Territory of Utah.

To the clerk of the Supreme Court of the United States:

The appellants, Adelia Young, Cedenia C. Young, and Delecta Maston, by their attorney, Le Grand Young, hereby file a statement of the errors on which said appellants intend to rely, namely: Commencing with the error numbered one, on page 34 of the statement of facts, down to and including error numbered 24, on page 36 of the statement of facts, inclusive—that is, all the errors numbered from 1 to 34 on said pages—and that part of the record on which said appellants intend to rely is the whole of the statement of facts, commencing on page one and ending on page 43 of said statement of facts.

This statement of facts above referred to and which I want printed includes the assignment of errors of appellants.

Also the following part of the transcript which accompanies and is attached to the statement of facts, namely:

The findings of the district court, commencing on page four of the transcript and ending on page six; (2) decree of district court, commencing on page 7 of the transcript, ending on page 8; (3) the opinion of the supreme court of Utah Territory, being the last paper in the transcript, commencing on page 73 thereof.

Please let me know the cost of printing and I will forward draft.

Respectfully, LE GRAND YOUNG.

Received this 22d day of September, 1896, of Le Grand Young, counsel for Adelia Young, Cedenia C. Young, and Delecta Maston, a copy of the above and foregoing statement.

S. P. ARMSTRONG,
Att'y for Jennie Amy.

106 [Endorsed:] Case No. 16,395. Supreme Court U. S., October term, 1897. Term No., 242. Amelia Young *et al.*, app'ts, *vs.* Jennie Amy. Statement of error & designation of the parts of the record considered necessary to be printed by app'ts, & acceptance of service. Filed December 29, 1896.

Endorsed on cover: Case No. 16,395. Utah Territory supreme court. Term No., 242. Adelia Young, Cedenia C. Young, and Delecta Maston, appellants, *vs.* Jennie Amy. Filed October 2nd, 1896.

No. 942.

JAN 12
JAMES H. McKE

SUPREME COURT

OF THE

TERRITORY OF UTAH.

ON THE RELATION OF THE ATTORNEY GENERAL OF THE TERRITORY OF UTAH,

Plaintiff,

vs.

JOHN TAYLOR, ET AL.,

Defendants.

Brief of Appellant's Attorney, Young, et. al.

LE GRAND YOUNG,

Attorney for Appellants.

Deseret News Print, Salt Lake.

IN THE

SUPREME COURT

OF THE UNITED STATES.

IN THE MATTER OF THE ESTATE OF OSCAR A. AMY, Deceased, ADELIA YOUNG CEDENIA YOUNG and DELECTA MASTON,
Appellants.

vs.

JENNIE AMY,
Respondent.

Brief of Appellant's Adelia Young, et. al.

The controversy in this case arose over the estate of the late Oscar A. Amy, who died intestate in Summit County, then Territory of Utah, on the 26th day of May, 1891, leaving surviving him neither father nor mother, or sisters or brothers of the whole blood, or children or wife, as appellants claim.

His estate was duly administered in the county where he resided, and at the time of the distribution there appeared three sets of claimants for his property before the court:

First, Royal D. Amy, et. al. the half brothers and sisters of Oscar Amy, deceased, and children of his father by a former wife.

Second, his three aunts, namely, Adelia Young Cedelia Young and Delecta Maston sisters of his mother.

Third, Jennie Amy, who claimed to be his wife.

The probate court decided in favor of his three maternal aunts, holding that the property, having come from the ancesters of the deceased's mother Royal D. Amy, et. al. could not inherit it; and also holding that the said Jennie Amy was the wife of one Elliot Butterworth, from whom she had never been legally divorced, and therefore was not the wife of Oscar A. Amy at the time of his decease although a marriage ceremony was proven to have been performed between the said Oscar A. Amy and Jennie Amy some time in the year 1896.

The case was appealed to the third judicial district court Honorable S. A. Merrit presiding, and was there tried anew on the 18th day of January 1895, resulting in a judgment in favor of

said aunts of said deceased Oscar A. Amy, namely Adelia Young, Sadenia Young and Delecta Maston; see printed Transcript page ———. The case was appealed by the said Royal D. Amy, et. al. and also by Jennie Amy to the supreme court of the then territory of Utah, and there the decision of the district court was reversed and the property was awarded to Jennie Amy, the court holding that she was the legal wife of Oscar A. Amy, deceased at the time of his death, and that she was not the wife of Elliot Butterworth having been divorced from him by the probate court of Washington County, Utah, in September, 1879; from which decision of the supreme court of the territory of Utah, Adelia Young, Sedenia Young and Delecta Maston has appealed to the supreme court of the United States; Royal D. Amy et. al. gave no notice of appeal and therefore that portion of the proceedings being the basis of their claim, will be omitted as far as practical in the argument of this case.

The record discloses the following facts; see findings of fact Transcript page 1 to 4.

First, that Levira C. Smith Amy, come to Utah in an early day, and settled upon a piece of ground the subject of this controversy, described

as follows, to-wit; a portion of lots one and two, block 70, plat "A" Salt Lake City Survey, Utah Territory, described as follows, to-wit: commencing 49½ feet south from the northeast corner of said lot one, thence south three rods; thence west eleven rods; thence north three rods; thence east eleven rods; to the place of beginning.

That when the township was entered by the mayor, pursuant to an act of the legislature of Utah, Levira C. Smith filed upon the land, obtained a title to it, and continued to reside there until she died in 1883. She left surviving her, said Oscar A. Amy, aged about twenty-five years, and also a daughter Levira A. Smith aged about forty years by a former husband, Samuel Smith; also leaving surviving her said three sisters, namely, Adelia Young, Sadenia C. Young and Delecta Maston.

The two children Levira A. Smith and Oscar A. Amy continued to occupy the home of there mother until 1888, when Levira A. Smith died, leaving no relatives that claim this property so far as this case is concerned, except Oscar A. Amy who succeeded to her right therein.

Oscar A. Amy continued to hold the property until his death, in 1891, as above set forth. He

left surviving him his said three aunts, sisters of his mother but left no children, or brothers or sisters of the whole blood, but in the year 1886, a marriage ceremony was performed between himself and the said Jennie Amy, or Mrs. Jane Butterworth, as she had been up to that time known.

It will be observed by turning to the testimony (see page 4 of Transcript,) that respondent herself on the witness stand stated that she had been married to one Elliott Butterworth in Washington County, in the year 1875, and that afterwards Elliott Butterworth moved out of the Territory of Utah into the Territory of Idaho, and there he remained, and that in the year 1879, (see pages 4 to 13 of printed Transcript,) she begun proceedings of divorce against her husband in the Probate Court of Washington County, Territory of Utah.

It will be observed by turning to the record that the alleged wife of deceased, Jennie Amy, introduced certain papers to sustain her claim of divorce from her former husband, namely, the complaint and the decree of court (see pp. 5, 12 and 13 printed Transcript.) These two papers constituted what the alleged wife claimed to be the record in the divorce proceedings, printed Transcript page 4. There being no summons in the record.

She also introduced in evidence a copy of the Silver Reef Miner, a semi-weekly newspaper, claimed to have been published Wednesday's and Saturday's in Silver Reef, Washington County, Utah, dated the 30th of July, 1879, which newspaper contained, she alleged, the publication of summons (see pages 4, 5, 6 and 14 printed transcript) and she also introduced five other papers, claimed to be clippings from this same paper or other issues of it, and marked "Jennie Amy's Exhibits D, E, F, G and H." (see page 14 of printed record.) All of these exhibits were duly objected to as being irrelevant, immaterial and incompetent to establish the alleged divorce.

Jennie Amy went upon the witness stand and testified (see printed record) under the objection of the said Adelia Young, et. al. as to the relevancy, materiality and competency of such testimony, to the effect that she saw a summons in the case. Respondents then placed upon the witness stand Elliott Butterworth, who was allowed to testify over the objection of appellant, that he received through the mail, a summons in "a letter from the court in Washington County, Utah, and that he also received a paper through the mail, the Silver Reef Miner," in

which was a printed summons; see Transcript pages 6, 7 and 8 and Jennie Amy's Exhibit C; D, E, F and G, page 14 printed Transcript. To all of which testimony and evidence appellant's duly objected on the ground that the same were wholly irrelevant, incompetent and immaterial; see printed Transcript, page 22.

The appellant's in the Supreme Court of Utah, (Royal D. Amy, et. al.) introduced in evidence the whole record of the divorce proceedings of Jane Butterworth vs. Elliott Butterworth; see Royal D. Amy's Exhibit 4, page 15 of printed Transcript.

Under this brief statement of facts, and as they are more fully shown in the findings of fact by the Utah Supreme Court and by the evidence on which they are based, the question is presented who are the heirs of Oscar A. Amy, deceased, and who are entitled to inherit his property?

The said Jennie Amy, as before said claims to be the widow of Oscar A. Amy, and entitled to the whole of his estate. This question was decided in the negative by the Probate and District Courts, holding that she was not the widow, having never been legally divorced from her former husband, which she admits she had, and that the maternal aunts, namely, Adelia Young, Cedenia C. Young

and Delecta Maston, the full sisters of the mother of said deceased, Oscar A. Amy, inherited his property. The Supreme Court of Utah reversed District Court, holding that Jennie Amy had been legally divorced from Butterworth and that she was the widow of Oscar A. Amy.

The questions now before this court is, did the Supreme Court of Utah properly interpret the law? The claim of the appellants is that Jennie Amy was the wife of Elliott Butterworth, and that the divorce proceedings between these parties in the Court of Washington County were void, for the reason that the court never had jurisdiction of the person of said defendant, neither constructive or otherwise. The facts are, it is admitted on all sides, the said Butterworth resided in Idaho, and not in the Territory of Utah; and there is no pretense that he was served by a summons in the usual manner or at all. There was no pretense that he was in the jurisdiction of the court at all during the divorce proceedings. But Respondents claim that the jurisdiction was obtained by special proceeding under the statutes of Utah Territory then in vogue, to-wit: Sections 1255–6, Compiled Laws of 1876, being the code of Civil Procedure adopted in the Territory of Utah, approved February 17, 1870.

These two sections above referred to read as follows:

"(1255) Sec. 30. When the person on whom the service is to be made resides out of the Territory, or has departed from the Territory, or cannot after due diligence be found within the Territory, or conceales himself to avoid the service of summons, or being a corporation, or joint stock association, cannot be served as provided in section twenty-nine, and the fact shall appear by affidavit to the satisfaction of the court or a judge thereof, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of summons."

"(1256) Sec. 31. The order shall direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served. If any defendant is a non-resident of the Territory, but has an agent therein, service may be made upon him by serving the same on such agent, or by leaving a copy thereof at his usual place of business with any person in charge thereof. When any defendant is a non-resident,

or his residence is unknown, and has no known agent or place of business in this Territory, service may be made by publication in some newspaper printed in and having general circulation in the Territory, which publication must contain the names of the parties, plaintiff and defendant, to the complaint, a statement of the objects thereof, the name and style of the court in which the same is filed, and also notify the persons thus to be served when they are required to answer; said publication shall be inserted four times consecutively; the first insertion shall be at least forty days before the time of answer, and a copy of which shall be immediately deposited (post paid) in the postoffice, directed to the defendant or defendants at their last known place of residence or business. In actions on contracts for the direct payment of money, the court in its direction may after publication, appoint an attorney to appear for the non-resident, absent or concealed defendant, to conduct the proceedings on his part. The return of the officer serving the process as to any fact required by law for him to show on such return, either on mesne or final process, shall be prima facie evidence of the truth of such facts."

Then Section 1258 on the same page pro-

vides that the proof of the service of the summons shall be, if served by the Territorial marshall, or the sheriff, his certificate etc. In case of publication the affidavit of the publisher, his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post office, if the same shall have been deposited.

These are the sections that apply to the making and proof of service by publication, and the first question to be discussed is, did the respondent Jennie Amy, comply with the law? As I said above, the respondent's introduced in evidence a portion of the record in the divorce case of Butterworth v. Butterworth, namely the complaint and decree. The appellant objected to the introduction of these papers on the ground that they were immaterial, irrelevant and wholly incompetent, for the reason that plaintiff did not allege that she was a resident of the county as the statute required; but most of all, that there was no order for publication, nor was there any affidavit of the printer or publisher, none at least that respondent's offered to introduce in evidence. There was an affidavit of the publisher of the Silver Reef Miner, among the divorce papers, (see printed Transcript p. 15,)

but it was so defective that respondent's did not attempt to put it in evidence, claiming that the affidavit of the printer must be lost. To supply this plainly defective record and especially to prove serivce on defendant, respondents placed the said Elliott Butterworth on the witness stand as above noted, who testified that he lived in Idaho at the time of the alleged divorce; see printed Transcript pages 6, 7 and 8; and that he had received by mail certain copies of the Silver Reef Miner, a newspaper in which was printed a copy of a summons, and that he received this paper while a resident of Idaho; see Jennie Amy's Exhibits C, D, E, F and G; page 14, printed Transcript.

The Supreme Court of the State of Utah, see Justice King's opinion, page 29 of the printed Transcript, on the facts before it, decided substantially that:

1. That the Probate Court of Washington County was a court of general jurisdiction.

2. That the decree rendered in the case makes recitals of service by publication upon the defendant, and that said decision cannot be impeached in a collateral proceeding.

3. That the record imports verity, and

that none of the papers which may be found in the files can be received to contradict recitals of due service.

4. That service by publication is a regular method of getting jurisdiction over an absent defendant, and that all the presumptions are in its favor that would be had by a court where defendant has been served within the jurisdiction thereof. In other words, there is no exception to the rule that a decree reciting the fact that a summons has been duly served, whether served by the sheriff by personal citation or by advertisement through a newspaper, it is binding on every body.

5. That parties who have nothing to do with the record and are not privies to it are bound by it just the same as persons who are privies to the record.

6. That a defective record can be cured by oral testimony.

7. That although the record upon the face thereof shows the want of jurisdiction over the person yet the recital of due service by publication is conclusive on all persons and all parties, although the recital is disputed in the record itself.

8. The court substantially held it was collaterally attacking the alleged divorce pro-

ceedings to call upon Jennie Amy, the respondent herein, to show that service was had on the defendant, in Butterworth vs. Butterworth, in accordance with the statute of Utah at that time, although the said Jennie Amy, who is seeking to introduce it in evidente is the one who expects to derive all the benefit under it.

9. That in proceedings under a statute like the one of Utah, 1876, Compiled Laws, Sections 1255, 1256, 1258, and herebefore set out at large in this brief, it is not necessary that there should be any order for publication, nor indeed necessary that there should be any affidavit of the printer or publisher as required by Section 1258, supra.

10. The Supreme Court of Utah substantially holds that notwithstanding they base their opinion on the inviolable and impeachable character of the judgment that recites the fact that it had jurisdiction. I say notwithstanding the recital and the holding of the Supreme Court, that it cannot be questioned, still the court recognizing the patent defect of the pretended judgment allows evidence outside of the record, oral testimony, to be taken, to show that service of summons was had, recognizing the fact that nothing in the record disclosed such service, and recognizing the fact that the

recital in the judgment itself is not sufficient guaranty for the position they take.

On these peculiar holdings, after the decree was entered in the Supreme Court the appellants Adelia Young et.al. made the following assignment of errors:

1. The Supreme Court of Utah erred in admitting and considering the evidence of Jennie Amy's Exhibit A.

2. Said Court erred in admitting and considering Jennie Amy's Exhibit B.

3. Said Court erred in admitting and considering Jennie Amy's Exhibit C.

4. Said Court erred in admitting and considering all three of the exhibits together.

5. Said Court erred in admitting and considering Jennie Amy's Exhibit D.

6. Said Court erred in admitting and considering Jennie Amy's Exhibit E.

7. Said Court erred in admitting and considering Jennie Amy's Exhibit F.

8. Said Court erred in admitting and considering Jennie Amy's Exhibit G.

9. Said Court erred in admitting and considering Jennie Amy's Exhibit H.

10 The said Court erred in admitting and con-

sidering the oral testimony of Jennie Amy in proof of her alleged divorce.

11. The Court erred in admitting and considering the oral testimony of Elliot Butterworth in support of said divorce.

12. Said court erred in rendering judgment in favor of Jennie Amy and against the said Adelia Young, et. al.

13. The said court erred in holding that the burden of proof was on Adelia Young, et. al. to show that said pretended judgment of divorce was void.

14. The said court erred in holding that said pretended judgment in the Probate Court of Washington County cannot be attacked collaterally in an action of this sort.

15. The said court erred in holding that Jennie Amy was lawfully divorced from Elliott Butterworth by the proceedings in the Probate Court of Washington County.

16. The said court erred in deciding in favor of Jennie Amy, that she was the widow of Oscar A. Amy, deceased.

17. The said court erred in holding it was collaterally attacking the alleged divorce of Jane Butterworth or Jennie Amy, for the reason that

she, like any other person claiming to be the heir of Oscar A. Amy, was bound to show her right to inherit it, and the burden of proof was on her to show this.

18. The court erred in holding that Adelia Young, et. al. could not question said divorce proceedings introduced in evidence by Jane Butterworth, re Jennie Amy, and in holding that it was collaterally attacking said pretended divorce proceedings by requiring her to affirmatively show her legal right to inherit the property of Oscar A. Amy, deceased.

19. The said court erred in admitting the evidence, "Exhibit 4," of Royal D. Amy, et. al. or any part of said pretended record.

20. The court erred in holding that the affidavit of the publisher of the Silver Reef Miner was sufficient.

21. The said court erred in holding that it was not necessary that there should be an order of the court directing publication.

22. The said court erred in holding that the only papers necessary in proof of publication were the complaint, summons, and affidavit of the printer, and judgment.

23. The said court erred in holding that said

Probate Court prior to 1874, or ever possessed common-law or chancery jurisdiction.

24. The said court erred in holding that the said Probate Court of Washington County, Territory of Utah, was a court of general jurisdiction.

The questions that were discussed under these errors may be resolved in about seven or eight.

1. Can a record of a court that is fatally defective upon its face be inquired into by a person not a party to it when such record is introduced or is sought to be introduced in evidence in any case?

2. When a party seeks to introduce in evidence a record of a court of limited jurisdiction, or indeed of general jurisdiction which record shows upon its face that the defendant is a non-resident of the state or territory where the court has jurisdiction can the fact that such a record is defective, and shows no service upon the defendant, be inquired into and attacked by a party who is not a party to or privy of said record?

3. When a party introduced a record of a court as evidence in a case claiming a benefit under it, is it competent for the opposite party not privy to said record to attack it for material defects appearing upon its face?

4. Can oral testimony be received to establish service of a court upon a non-resident defendant where the record shows no such service?

5. It is not every person who claims to be an heir of a deceased party when challenged bound to produce evidence to support his or her claim to such heirship?

6. Is not a court who seeks to obtain service on a non-resident defendant bound to strictly conform to the prescribed requirement of the statute to obtain such service, and must not the record affirmatively show that service has been had in accordance with the statute, and if the record fails to show that can not any person who is not a party or privy to it attack it especially when the person introducing it in evidence in another case is seeking a benefit under it?

7. Is not a record that shows upon its face as does the one in evidence, (see Exhibit No. 4) Royal D. Amy, printed Transcript p. 15, that no service was ever had, different from one that is absolutely silent upon that subject?

8. Is there not a material difference between a decree or judgment that recites, that due service was had and is silent how it was had, and one that recites that due service was had by

publication and the record not only does not show that fact put disputes it?

The part of the divorce record offered by plaintiff, viz: the complaint and decree does not show where defendant Butterworth did reside; but by the whole divorce record introduced by the attorneys for Royal Amy et.al. see printed transcript page 15, the fact is disclosed, and, indeed, Mrs. Amy said her husband Butterworth lived in Idaho; and therefor, of course, no process issuing from the Probate Court in Washington county, Utah, could assume to reach him; and here all presumptions cease as to the validity of the judgment, and the burden of proof is on the applicant who introduced the judgment and who claimed under it to show that constructive service was had in harmony with the statutes made in such cases. Turning to the record in this matter let us see if Mrs. Amy has brought herself within the rules of such cases. Our statute in force at that time provides as follows: "Proof of the service of the summons shall be, if served by the Territorial Marshall or Sheriff of the county, the affidavit or certificate of such officer. Second, in case of publication, the affidavit of the publisher, his foreman or principal clerk, showing the same, and the affidavit and the deposit of a copy

of the summons in the post office, if the same shall be deposited. Third, the written admission of the defendant."

There is no order for publication nor never was, the pretended affidavit of the printer as required by our statute is in no way in compliance with the statute. The said statute requires, (see Section 1256 of the laws of 1876 above referred to) that "Said publication shall be in four times consecutively, the first insertion shall be at least forty days before the time to answer, the copy of which shall be immediately deposited postpaid in the post-office directed to the defendant or defendants at their last known place of residence or business."

The affidavit of the printer so defective that appellant didn't try to offer it, reads as follows: See printed transcript page 17, "Edward Pike being first duly sworn upon his oath, says that he is the editor and proprietor of a certain paper, published in the above named county and Territory called the *Silver Reef Miner*, and that he has within the last forty days forwarded to the defendant four different copies of the above named paper at four several times, containing summons in the above entitled action, and that said summons was a copy of the same issued by the clerk of the Probate Court of

Washington County, Utah Territory, and that the same was addressed to the defendant in the above entitled action at Franklin, Idaho Territory." Signed Edward Pike. Subscribed September 2, 1879.

Now if the court will notice there is not the least pretense of any compliance with the statute. 35 Mich 235.

There is no allegation nor showing in the affidavit that the notice was published forty days before the time to answer, or that a copy was immediately forwarded, it simply says that he has within the last forty days forwarded to the defendant four different copies. That affidavit could have been answered and a strict compliance with it could have been observed by the pnblisher sending four copies the week prior to the entry of the judgment. But it will be argued the affidavit said four different copies, they might have been different copies of the same issue; and as we do know the paper was a semi-weekly paper, we are left in doubt to know whether it was four consecutive issues for two weeks or for four. So if there were four copies sent they might cover two weeks. The law did not require more than one copy and the first should have been sent immediately after the notice of publication, which must have been at

least forty days before the time for answer and the affidavit must allege this.

4. Saw., 638.

Nor could this defect be cured by a recital in the judgment if due service had by publicaction even in courts of general jurisdiction.

In the case of Galpin vs. Page, 18 Wal. 365, deemed the leading case on this subject, not only in the United States Courts but in all the courts of this county Mr. Justice Field delivering the unanimous opinion of the court, says, page 368:

"Whenever, therefore, it appears from the inspection of the court, of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance so essential to the protection of parties without the territorial jurisdiction of the court, that we could not have felt disposed to dwell upon it at any length, had it not

been impugned and denied by the Circuit Court." Referring to Galpin v. Page, 1 Saw., 309.

Further on in the same case, the court says:

"When, therefore, by legislation of a state constructive service or process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person or absent party, not a citizen of the state nor within it, every principal of justice exacts a strict and literal compliance of the territoral provisions. And such has been the ruling we believe, of the courts of every state in the Union."

Justice Field then quotes a number of authorities both in California and elsewhere to substantiate this doctrine; and on page 370, the same case, this learned judge says:

"But it is said the court exercised the same function and the same power whether service be made on the defendant personally or by publication, and therefore the same presumption of jurisdiction attended the judgment of the court in the one case as the other. This reasoning would abolish the distinction of the presumption of law when applied to the presumption of a court of general jurisdiction acting in the scope of its

general power, and when applied to proceedings had under special statutory authority; and indeed it is contended that there is no substantial ground for any distinction in any such cases. The distinction, nevertheless has long been made by the courts of the highest character, both in this country and in England, and we had supposed that its existence was not open to discussion. * * * * *

Further on in the opinion the court quotes from the case of Morse vs. Presby, 5 Foster, 392, with approval, in which the court says:

"A court of general jurisdiction may have special and summary powers, wholly derived from statutes, not exercised according to the course of common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it must appear by the record; and every thing will be presumed to be without the jurisdiction which does not distinctly appear to be within it."

The Supreme Court of the United States proceeds to say that:

"The qualification here made that the special powers conferred are not exercised according to the course of the common law is important. When the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers—but where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record." * * * *

Still quoting in the same case the court says (page 372)

"The record in the two actions, and of course in the consolidated action, shows that the defendant was thus beyond the reach of the process of the court. All presumption of jurisdiction over her person by the District Court, which otherwise might have been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by the statute such jurisdiction was obtained. The statute provides, in case of absent and non-resident defendants for constructive service or process by publication. It requires an order of court or judge before such publication can be made; it designates the facts which must exist to authorize the order, the manner in which such facts must be made to appear, the period for which publication must be had, and the mode in which the publication must be established. These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order, which is the sole authority for the publication, and which by statute must presbribe the period and designate the paper in which the publication is to be made, should appear in the record with proof of compliance with its directions, unless its absence be supplied by proper averment. If there

is any different course of decision in the State it could hardly be expected that it would be followed by a Federal Court, so as to cut off the right of a citizen of another State from showing that the provisions of law, by which judgment has been obtained against him, has never been pursued."

I have quoted fully from the opinion of Galpin vs. Page for the reason as I have before said, this is a leading case on this subject, and is referred to in almost every court in the United States, and particularly by the Supreme Court of the United States and the Circuit and District Courts, of the United States.

In the same volume follows the case of Thompson vs. Whitman, page 457, where the same doctrine is re-announced, iterated and reiterated by the court. I will quote but one or two lines from this case, sufficient, however, to show the court that the doctrine is fully sustained, and that case goes further and denies that the doctrine ever existed in the Supreme Court or any of the courts of the United States, that a recital in the judgment was conclusive on persons *who were not parties to the judgment*, and particularly were the service was by publication or the like. Justice Bradley who delivered the opinion in this case,

and which was unanimously concurred in by all the judges, say:

"In Harris vs. Hardman et. al. 14 Howard, 334, it was a writ of error and the judgment held void by the court for want of service of process on defendant. The subject now under consideration was gone over by Mr. Justice Daniel at some length and several cases in the state courts were cited and approved, which held that a judgment may be attacked in a collateral proceeding by showing that the court had no jurisdiction of the person, or, in proceedings in rem, no jurisdiction of the thing."

The court then proceeds to quote the remarks of Justice Daniel at length and cited a large number of cases to sustain this opinion, which I will not here cite, but ask the court if it will kindly refer to them. See page 466-7. Indeed the whole case.

Following this case and sustaining Galpin vs. Page are numerous cases in the Supreme Court of the United States, among which is the case of Earle vs. McVeigh, 91 U. S. 503, where the doctrine of Galpin vs. Page is cited and approved.

Again in the case of Settlenuir vs. Sullivan U. S. 444-449 where this case of Galpin vs. Page is

again cited and approved, particularly as to the point that the record when it disclosed its own defects is fatal to the party that introduced it. In this case the court says: "We do not question the doctrine that a court of general jurisdiction acting in the scope of its authority, that is within the boundries which the law assigns to it in reference to subjects and persons, is presumed to act rightly and to have jurisdiction to render the judgment it renders until the contrary appears, and this presumption can only arise in respect to jurisdictional facts concerning which the record is silent."

So in the case of Cheely vs. Clayton, 110 U. S. 707, the case of Galpin vs. Page was again cited and other cases also, and the court in a elaborate opinion sustains the Supreme Court of Colorado, holding on very technical grounds that the statute in regard to constructive service must be carefully and correctly followed, and the party seeking a benefit under it is bound to show that everything was done that should be done. This was a divorce proceeding and no doubt worked great hardship on some party, but the court did not hesitate from its duty on this account.

Again, in the case of Applegate vs. Lexington etc., Mining Co., 117 U. S. 271, cited by Appellant,

the case of Galpin vs. Page is again mentioned and the doctrine therein announced in regard to constructive service is distinctly enunciated. Listen to what the court says:

"The case of Galpin vs. Page, 18, Wal. 350, cited by counsel for defendant, is not in conflict with this proposition (referring to what had gone before in deciding the case). The judgment set up on the one side and attacked on the other, in that case was rendered on service by publication and the law permitted service to be had by publication only where certain facts were made to appear to the satisfaction of the court, and the court by a precedent order, *which must certainly appear of record*, authorizes service to be made by publication. But the record shows no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual."

Again, in the case of Cuddy petitioner, 131 U. S. 285, the case of Galpin vs. Page is again referred to and cited and cited approvingly.

See in the case of Novle vs. Union River Logging Railroad, in 147 U. S. 173, in which the doctrine announced in Galpin vs. Page is referred to in the following way: "It is true that in every

proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such for example, as the service of process within the state, upon the defendant in a common law action. Authorities: Pennoyer vs. Neff, 95 U. S. 614, and other authorities; the seizure and possession of the res within the bailiwick in a proceeding in rem. Thompson vs. Whitman, supra. A publication in strict accordance with the statute, when the property of an absent defendant is sought to be charged, Galpin vs. Page, supra, and other cases cited above and many cases not and cited.

Other cases in the Supreme Court might be adduced, but I will content myself with now referring to the cases in the Circuit Courts of the United States. Walbur vs. Abbot, 6 Fed. Rep., 814, 816, in which the case of Galpin vs. Page, 18 Wal., is approvingly cited, and announced to be the doctrine of that court. Again in the case of Cissell vs. Pulaski County, 10 Fed. Rep., 893, the court says: "It is a rule without qualification or exception, that if it is sought to conclude a party by constructive service by publication, a strict

compliance with the requirements of the statute is required; nothing can be taken by intendment. Everything necessary for the fact of jurisdiction based on the mode of service, must affirmatively appear in the mode prescribed by the statute; Gray vs. Larimore, 4 Sawyer, 638–46; Steinbeck vs. Leese, 27 Cal., 295; Galpin vs. Page, and many more cases cited by me above and some that are not cited in this brief. See Gray vs. Larimore, supra, Noves vs. Butler, 6 Barber 617; Lowery vs. Cady, 4 Vt. 506, and see also Graham vs. Spencer, 14 Fed. Rep. 605, where the case of Galpin vs. Page is again announced as the doctrine of the courts of the United States. Also the case of Romaine vs. Union etc. Co., 28 Fed Rep., 639, where a great array of authorities are cited, and among them Galpin vs. Page, announcing the doctrine made it that case to be the doctrine of the United States Courts.

Again in the case of Martin vs. Barbour, 34 Fed. Rep., 708, where the doctrine of this case of Galpin vs. Page is approved, and a contrary doctrine came up from the state of Minnesota, is severely criticised and overruled. It says: "The rule is without qualification or exception, that when it is sought to conclude a party by construc-

tive service by publication, a strict compliance with the requirements of the statute is required, and nothing can be taken by intendment, and every fact necessary to the exercise of jurisdiction based on this mode of service must affirmatively appear in the mode prescribed by the statute."

To the same effect are many more cases of the Supreme Courts and Circuit Courts, but I will content myself by citing the court to a few that announce the same doctrine.

I Peters 340; 3 How. 762; 8 How. 681-2; 124 U. S. 220, and cases there cited.

1 Black on judgments 232.

Freeman on judgments 127.

Second.—A party introdncing a record seeking the benifit of it even inform a court of competent jurisdiction, and where service has been had personally when every intendment is in favor of the jurisdiction of the court, the judgment introduced by such party is always open to collateral attack.

In the case of Elliot vs. Peirsol, 340, the court says: "This distinction runs through all the cases and proves that the jurisdiction of any court exercising authority over a subject, may be injuired into in every other court, if a proceeding if the former

are relied on and brought before the latter by a party claiming the benefit of such proceedings."

And in the case of Hiskey's Lessee vs. Stewert 3 How. 756, where they quote this same language, that is, that the jurisdiction of any court exercising authority over the subject may be enquired into every other court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.

The same doctrin is anounced in the case of Thompson vs. Whitman, 18 Wal. 468, that a person who seeks to introduce a judgment in another court from the one in which the decision was made, and expects to derive a benefit under it the record can be inquired into and attacked collaterally.

And the same doctrine is anounced in the case of Guaranty Trust Co. vs. Greene et. al. 139 U. S. 147. The court says: "In reply to the argument that a court in chancery can be looked into in a collateral way, that is a rule well settled in jurisprudence that the jurisdiction in any court exercising authority over the subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such pro-

ceedings. The rule prevails whether the decree or judgment has been given in a court of admiralty, chancy, ecclesiastical or a court of common law, the decisions of these courts upon this subject beginning with the year 1794, have been uniform and consistent. Then the court cites a long line of leading cases on this question, and among them some that we have cited here.

It is hardly necessary for me to add that in this long list of authorities that the affidavit must conform to the statute, and every paper on which it is based, if wanting must be accounted for. The order was not in the record, nor was it accounted for. The pretended affidavit of the publisher was in the record, not offered by appellants, but does not conform to any requirement of the statue.

Third.—Counsel attempted to supply the defect of service by showing orally that the defendant, Butterworth, received copies of the summons. The authorities are universal and without a break, announcing that this is most improper and never allowed.

It is never competent for a court to receive parol testimony to supply the omission of the record, Gray vs. Larimore, 4 Sawyer 638-46, Paine vs. Young, 4 Seldon 158.

There an attempt was made to supply the omission of the affidavit by evidence at the trial that the affiant was in fact the principal clerk of the printer, and such evidence was clearly inadmissible. The statute prescribes the character of the evidence which shall be produced and by whom shall be given. Statutory proof will alone suffice.

The same doctrine is announced in Noyes vs. Butler, 6 Barb, 617; Lowery vs. Cady, 4 Vt. 506; and in the case of Cissell vs. Pulaski County, 10 Fed. Rep's. 893, the court says: "It is not competent for this court to receive parol testimony to supply the omission of the record." Citing the cases I have above quoted and some others, Martin vs. Barber, 44 Fed. Rep's, announced the same doctrine.

So that the offer by the attorneys for Mrs. Amy to supply the omission of the record by oral testimony was void and without a legal precedent.

It leaves the case in this way, that there is no order of court for the publication of summons, nor any attempt to supply the defect, although the clerk of that court is living to day and states in the record that there never was an order. Second, the affidavit does not show what it was bound to show, that the publication was more than forty

days before the default was taken. It does not show it was one day. And third, and most of all, the burden of proof was on them to establish the jurisdiction over an absent defendant which they did not attempt to do.

This respondent must have done according to the doctrine of all the United States Courts, and especially the Supreme Court of the United States.

Turning now to the leading case cited by appellant in the court below, now appellants here, announced, namely: Hahn vs. Kelly, 34 Cal.

The doctrine there announced has been followed, I am aware, by some of the courts in the different states, particularly in Texas, and is the settled rule in California, and was so when our code was adopted in 1870; and would probably, under the rule, be binding upon this court, were it not for the fact that the Supreme Court of the United States has dealt with that question, and positively and emphatically overruled the doctrine therein.

In the case above quoted so fully from by myself, namely Galpin vs. Page, the Supreme Court of the United States was fully informed of the doctrin in Hahn vs. Kelly.

That the court may be certain of that fact allow

me to refer them to the case of Galpin vs. Page, 1 Sawyer 309. In that case the Circuit Court by Sawyer held in effect the doctrine announced in Hahn vs. Kelly, cited as the leading case of respondets and by the Supreme Court of Utah as the leading authority for its opinion. The case went to the Supreme Court of the United States ending in a reversal, which was the cause of a lengthy discussion made by that court in that now celebrated leading authority. 18 Wal. The case was sent back to the Circuit Court where the matter was again reheard before Justice Field, and is found reported in 3 Saw. 93. In that decision Justice Field says:

"But the Supreme Court of the United States in its decision went still forther and held that the rule stated by the Circuit Court, as to the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction, was subject to many exceptions and qualifications and had no application to the case at bar; that such presumptions were limited to jurisdiction over persons who could be reached by their process, and also over proceedings which were in accordance with the course of the common low. In these latter particulars, the decision was an affirmation of doc-

trines asserted by the Circuit Court in an elaborate and carefully considered opinion, delivered in 1895, in the case of Gray vs. Larimore, which grew out of the same rule under the same decree of the District Court which is now before us. The doctrines there asserted were followed in the subsequent case of Gray vs. Murphy, and, until the decision of this case by the present circuit judge, were not regarded as open to contestation in the Circuit Court. In this case they were overruled by him upon the supposed obligation of the court to follow a decision of the Supreme Court of the state in Hahn vs. Kelly, rendered in 1868 (34 Cal. 391). And to that case, frequent reference has been made by counsel on the present trial, and some of its positions have been pressed with great earnestness, as though they were decisive of the points now under consideration. That case was cited to the Supreme Court of the United States. Extracts from the opinion in the case constituted the principal arguement before that court, of one of the counsel of the defendants; and if its positions were not expressly mentioned in the opinion of the court it was not because they had not been carefully considered."

This quotation shows that not only the court

knew of the case of Hahn vs. Kelley, but the same was pressed upon the Supreme Court of the United States, and the doctrine therein announced was fully considered by that eminent court, and emphatically denied.

Of course, with the fall of this case of the Supreme Court of California, all kindred cases based upon the same reasoning must fall to the ground.

In the same case of Galpin vs. Page, 3 Saw, 93, the court deals with the question whether or not the ruling of the Supreme Court of California is binding upon other courts in regard to the laws of the State; and in this decision Justice Field says, quoting fron the Supreme Court of the United States:

"That this court does follow the decision of the highest courts of the States, respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind, that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution or statutes of a State, which the Federal Courts adopt as rules for their own judgments."

Then Justice Field proceeds to say:

"The ruling of the State Court, in Hahn vs. Kelly, except so far as it gives a construction to the State statute, relates to matters of general law, and not to questions of a local character peculiar only to the State."

And again, Justice Field, in the same case, quoting from Christmas vs. Russell, 5 Wal. 305, says:

"The judgments of the courts of one state are not foreign judgments in another state under the Constitution and act of Congress; nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the state where they were rendered; and they are open to inquiry as to the jurisdiction of the court and notice to the defendant."

Justice Field, in the case of Galpine vs. Page, last above referred to, says, referring to the opinion written by Justice Story in Picquet vs. Swan, that "In general it may be said that they authorize no judgment against a party, until after his appearance in court. He may be taken on a capias, and brought into court, or distrained by attachment and other process against his property and compel his appearance; and for non-appearance

be outlawed. But still, even, though a subject and within the kingdom, the judgment against him can take place only after such appearance. So anxious was the common law to guard the rights of private persons from judgments obtained without notice and regular personal appearance in court."

And Mr. Justice Field in the case of Galpin vs. Page, 3 Saw., found in 9 Federal cases 438, makes some caustic remarks in regard to the opinion of Justice Sanderson in Hahn vs. Kelly, in his citation from Blackstone to sustain the doctrine of constructive service, as he announced it.

Nor should it be forgotten that this doctrine established by Hahn vs. Kelly in California was without precedent in and against the settled doctrine of its courts.

Jordon vs. Giblin, 12 Cal. 100.
Ricketson vs. Richardson, 26 Cal. 149.
Forbs vs. Hyde, 31 Cal. 342.

Coming to the next point in the brief of respondents in the court below and where I presume will be urged here namely, that courts uphold decrees of divorce, permit me to say, not one of the cases cited by appellants in their brief in the court below so far as I have examined them, sustain

the doctrine contended for in this case.

The general doctrine that courts uphold decrees of divorce is well enough to announce, and is sustained by leading authorities where either one of the parties, after long years of separation, have changed their status relying upon the presumed divorce, courts of law or equity are reluctant to allow the question to be opened and litigated by either of the parties thereto. But this rule does not apply to strangers to the record and especially when the party introducing the record claims a benifit under it; see cases supra.

That Mr. Butterworth, or his wife, Jennie Amy, cannot question the validity of the divorce at this late day no one denies. They are estopped, not because there is a legal divorce, but because, after long years of silence, when new relations have arisen between each party, they will not be allowed at this late day to disturb that which they should have long ago questioned if they desire to do so.

I will close this argument on this point of my brief against respondent, Jennie Amy, by stating that while the courts of California, Arkansas, Texas, and indeed many other states, by *obiter dictum*, hold and maintain the authority contended

for by appellant in the court below but respondent here, and so vigorously asserted in Hahn vs. Kelly, 34 Cal. the leading case on that subject, I deny the doctrine, and I think I have established that the contrary are the better authorities.

The Supreme Court of Utah Territory, Justice King delivering the opinion, see printed transcript, page 29, et seq., take a very broad ground. They practically claim that a judgment from a court of general jurisdiction reciting the fact that service was had upon the defendant cannot be questioned in a collateral proceeding under any circumstances. The court makes no exception to the well known general exceptions to this rule, first that a party claiming a benefit under a judgment and seeking to introduce it in evidence must show that the court had jurisdiction if the judgment is challenged by the opposite party. And, second, that this statement that the judgment imports verity is also open to qualification, that parties not interested in the judgment or privies to it are not inhibited from questioning its validity when a judgment in a collateral proceeding is sought to be used against them.

The Supreme Court of Utah seems to base their opinion upon the allged fact that the Probate

Court of Washington County, Utah, was a court of superior and general jurisdiction. See page 31 of the printed record, where the court speaking through Justice King, say:

"Prior to 1874, under various acts of the legislature the Probate Courts possessed common law and chancery jurisdiction and authority to try and determine criminal cases. While many of these enactments conferring this jurisdiction upon such courts were unconstitutional, they indicate the purpose of the legislature to treat them as courts of general jurisdiction. By the Poland bill they were shorn of all civil, chancery, and criminal jurisdiction excepting in divorce proceedings. From the earliest history of the Territory these courts have exercised jurisdiction in divorce cases, and, though Congress stripped them of powers theretofore exercised, it did not deprive them of jurisdiction in this class of cases until 1887."

And then on page 34 printed transcript, the Court again, say:

"Regarding probate courts as courts of general juridiction the question that naturally suggests itself is, what presumptions attend such courts?"

I do not think it is too much to say that Justice King in delivering the opinion of the Supreme Court, did not seem to grasp the distinction between actions even in courts of general jurisdiction where a defendant is summoned and duly served within the jurisdiction of the Court and where he is called upon to answer a constructive service when the face of the preceedings show he lived and was beyond the jurisdiction of such court and never appered in the action. And as a matter of fact even if all this were true and such statement could be wrranted by the decision of the courts, the Supreme Court of Utah is very much at fault when it holds that Probate courts of Utah ever had common law or chancery jurisdiction or authorized to try and determine criminal cases, or that there jurisdiction was stripped from them by what was known of the Poland bill, with the exception of jurisdiction in divorce preceedings. Nor is it correct that these courts since the earliest history of the Territory have rightfully exercised jurisdiction in divorce cases.

The facts are the Probate courts were organized as courts of limited jurisdiction by the organic act of the Territory of Utah, and chancery and common law jurisdiction was conferred by that act

upon the District courts and the Supreme Court of the Territory. The legislature truly undertook to give Probate Courts concurrent jurisdiction with the District courts, but these enactments of the leglislature were absolutely void, but such jurisdiction was never conferred upon the Probate Courts. In proof of this statement, if proof is needed, I need only refer to the case of Ferris v. Higley, 20 Wal, 375, where the Supreme Court of the United States, speaking through Justice Miller say:

"The act of the Territorial Legislature conferring on the Probate Courts a general jurisdiction in civil and criminl cases both in chancy and common law is inconsistent with the organic act and is therefore void."

See Cast vs. Cast, 1 Utah, 112.

Nor did the act of Congress continue the jurisdiction of the Probate Courts in divorce matters. On the contrary, by act of Congress, entitled "An Act in relation to courts and judicial officers in the Territory of Utah, approved June 3, 1864, and usually known in Utah as the Poland bill, the third section provides that Probate Courts in their respective counties shall have jurisdiction in the settlements of estates of decedents, etc. Virtually

re-enacting the organic law of the Territory, and then adding jurisdiction in divorce, and then provides, on latter part of the section, page 104, That all judgments and decrees heretofore rendered by Probate Courts which have been executed and time for appeal from which has been by existing law of said Territory expired, are hereby validated and confirmed."

Without going further into this opinion I will close this brief by saying I deny that it ever was the law in any civilized country, especially where the common law has force, that a judgment of courts of even general and unlimited jurisdiction import absolute verity under all conditions and circumstances. There has always been exceptions to this general rule, and one of the many ones is that when the face of the judgment itself shows that the defendant was beyond the process of the court, beyond the jurisdiction of the sovereignity that gave it existence, and there is no appearance of the defendant and the record discloses that there was no effort made to conform to the law to obtain constructive service, such judgment can always be questioned by parties not privy to it, indeed by the defendant himself if he can show, which he has a right to show, that he never was

served or appeared in the case.

I am aware there is some dicta of the courts to the contrary, and there may be and are no doubt some cases that go to the length claimed by the Supreme Court of Utah; but these cases are not sustained by respectable authority nor by reason nor by the just anologies with the law.

Respectfully submitted,

LE GRAND YOUNG,

Attorney for Appellants.

In the

Brief &

BRIEF

SUPREME COURT

OF THE

ADELIA YOUNG, CELESTIA YOUNG AND DELECTA PRESTON, APPELLANTS,

vs.

JENNIE ANN, RESPONDENT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

C. S. VARIAN,
Attorney for Respondent.

W. H. DICKSON,
S. P. ARMSTRONG,
Of Counsel.

(16,395.)

(16,395.)

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE ESEATE OF OSCAR A. AMY, Deceased.

ADELIA YOUNG, CEDENIA YOUNG AND DELECTA MASTON, APPELLANTS,

vs.

JENNIE AMY, RESPONDENT.

RESPONDENT'S BRIEF.

The record in this case (Trans. p. 1) shows that there were three classes of claimants to the estate of Oscar A. Amy, deceased, each class claiming the whole estate.

First—The appellants, Adelia Young, Cedenia Young, and Delecta Maston, the maternal aunts of Oscar A. Amy, deceased, who were represented in the trial court by Le Grand Young, Esq.

Second—The respondent, Jennie Amy, the widow of Oscar A. Amy, deceased, who was represented in the trial court by S. P. Armstrong and W. H. Dickson, Esqs.

Third—Royal D. Amy, Francis L. Jackson, Ellen R.

Smith, Mary A. Haynes, and Sabia A. Clark, brothers and sisters of the half-blood of Oscar A. Amy, deceased, who were represented in the trial court by Messrs. Pence and Allen.

This third class, being the said half brothers and half sisters of decedent, have not appealed to this court, and are no longer contesting for his estate, it having been determined by the Supreme Court of Utah that the said half brothers and half sisters are not of the blood of the ancestor through whom the decedent, Oscar A. Amy, inherited the property in question, and hence, under the statute of Utah, have no part in the inheritance.

So that in this court the contention is between the respondent, Jennie Amy, on the one hand, claiming the whole estate; and on the other hand, the appellants, who together claim the whole estate as the sole heirs of the decedent.

Oscar A. Amy died intestate May 26, 1891, leaving no issue, and without father or mother or brother or sister of the full blood or blood of the ancestor through whom he inherited this property; therefore, if the respondent, Jennie Amy, is his widow the whole property involved in this suit goes to her under the laws of Utah in force at the time of his death.

Com. Laws Utah, 1888, p. 123, par. 4.

Jennie Amy, the respondent, married the deceased, Oscar A. Amy, on April 4. 1886, and lived with him as

his wife and had two children by him. Both died before the death of her husband. Trans. p. 4.)

Said Jennie Amy was previously, in 1875, married at the age of 16 years to one Elliott Butterworth. It is contended on the part of appellants that she was not legally divorced from this former husband, and hence was not the lawful wife of Oscar A. Amy, deceased.

She instituted proceedings for divorce from the said Butterworth and obtained a decree September 3, 1879, in the Probate Court of Washington County, Utah. (Trans. p. 13.)

THE CASE PRESENTS THIS QUESTION:

Is the decree of divorce valid as against a collateral attack?

If the decree of divorce is valid then Jennie Amy was lawfully married to decendent in 1886, and is now his legal widow, and as such, his sole heir.

EVIDENCE OF THE DIVORCE OFFERED BY JENNIE AMY.

Jennie Amy testified that she brought an action to obtain a divorce from Butterworth (Trans. p. 4-5), and offered certified copies of the complaint and decree, being Jennie Amy's exhibits A and B (Trans. pp. 12-13), showing a verified complaint filed July 16, 1879, in the Probate Court of Washington County, Utah, in the case

of Jane Butterworth against Elliott Butterworth, and the decree dated September 3, 1879.

Said decree contains the following recital: "It also appearing to said Court that said defendant was duly served with process by publication."

No summons was found on file in said cause. To show that a summons was issued, witness testified that she saw the summons in said case at the time the action was pending, and offered in evidence a copy of the Silver Reef Miner, a semi-weekly newspaper, dated July 30, 1879, containing the publication of summons in said case, which summons shows that it was issued July 16, 1879, which paper witness testified had been in her possession ever since said action was pending. (Trans. pp. 5-6.)

Said paper is marked "Jennie Amy's exhibit C. (Trans. p. 14.)

Elliott Butterworth, her former husband, testified that he was a resident of Franklin, Idaho, during and before and after the pendency of said divorce action; that he received a summons by mail in said case, while the same was pending, and at least six copies of said Silver Reef Miner, each containing a publication of said summons; that said papers came to him through the mail, postage prepaid, through the months of July and August, as the same were published; that he clipped said summons out of said papers, five of which he had preserved, and the said five clippings were offered in evidence; it appearing from said clippings that no two had been

clipped from the same issue of said paper. [Trans. pp. 6 to 11.]

Said clippings are marked "Jennie Amy's exhibits D, E, F, G and H." [Trans. pp. 11 and 14.]

Witness Butterworth further testified that he married again in October, 1880, and is still living with his wife, by whom he has seven children.

EVIDENCE TO IMPEACH THE DECREE OF DIVORCE OFFERED BY ROYAL D. AMY, WHO IS NOT A PARTY IN THIS COURT.

Royal D. Amy, for the purpose of impeaching said divorce decree, offered what he claimed to be the judgment roll, consisting of the complaint, decree, affidavit of non-residence, affidavit of mailing paper containg summons to Defendant Butterworth, the minutes of the court, and a copy of the docket of said court, with a certificate of the Clerk that the same are all the papers which are filed in said case.

Mr. Dickson objected to the two affidavits and the minutes of the court on the ground that they are no part of the judgment roll.

On objection of Mr. Young, the whole offer was excluded. [Trans. pp. 14-15.]

Said offer is marked "Royal D. Amy's exhibit 4." [Trans. pp. 15 to 19.]

I.

THE PROBATE COURTS HAD GENERAL JURISDICTION OF DIVORCE CONCURRENT WITH THE DISTRICT COURTS.

By act of March 6, 1852, general divorce jurisdiction was conferred on the Probate Court.

Laws of Utah (1851 to 1870), p. 49.

By act of Congress, June 23, 1874, the Probate Courts of Utah retained jurisdiction in divorce concurrently with the District Courts.

Vol. 18, part 3, U. S. Stat. at Large, Chap. 469, Sec. 3, p. 254.

Com. Laws Utah (1876), p. 53, Sec. 3.

And this jurisdiction was continued by the amendment of the divorce law in 1878.

Laws of Utah 1878, p. 1

Com. Laws Utah (1876), p. 375.

II.

THE DECREE OF DIVORCE WAS IN NO WAY IMPEACHED BY THE APPELLANTS.

The complaint and the decree, made by a Court which had jurisdiction of the subject matter, are suffi-

cient to show a valid divorce. It was not incumbent on the respondent to show the issuance and service of summons; for the decree itself, (reciting "that said defendant was duly served with process by publication") shows that the Court had jurisdiction of the defendant. No attempt was made by the appellants to contradict this recital. The only evidence offered for that purpose was offered by Royal D. Amy (who is not a party to this appeal), and was excluded on the objection of Mr. Young, attorney for appellants. So that appellants in attempting in this court to impeach the decree would fain avail themselves of certain papers which, on their objection, were excluded by the trial court.

III.

THE DECREE WAS MADE BY A COURT OF RECORD.

The law of 1852, as amended by the law of 1878, was in force at the time the divorce action was commenced and decree rendered.

Com. Laws, 1876, p. 375.
Laws, 1878, p. 1.

The organic act provides for Probate Courts, the jurisdiction of which should be as limited by law (with the implied exception of chancery jurisdiction).

Organic Act, sec. 9, Com. Laws, 1876, p. 31.

By the act of February 2, 1852, Probate Courts were given jurisdiction in habeas corpus.

Com. Laws, 1876, p. 371.

Laws of Utah (1851 to 1870) p. 39, sec. 3.

The writ was issued under seal of the Court.

Id. sec. 5.

The act of February 4, 1852, provided for appeals from Justices of the Peace to Probate Court, where the case was to be tried in the same manner as an issue of fact upon an indictment.

Laws of Utah (1851 to 1870), p. 33, sec. 11-22.

And that the record of proceedings had at Coroner's inquest was to be filed in Probate Court.

Id. p. 34, sec. 18.

By act of March 3, 1852, the Probate Court had jurisdiction in the estates of decedents.

Id. page 43, sec. 10-11, chap. 14.

And by another act of same date the Probate Court is recognized as having criminal jurisdiction and a clerk and office in which to file papers.

Id., p. 38, sec. 8.

From all of which it appears that the Probate Court had a clerk and a seal, kept records and an office, and had general jurisdiction over a number of classes of

cases, including criminal, and was therefore a Court of Record.

3 Black. Com. p. 24.

See citations hereafter.

This was the kind of court, in so far at least as the Legislature could confer general jurisdiction, upon which was conferred general divorce jurisdiction by act of March 6, 1852.

Laws of Utah (1851 to 1870), p. 49.

Com. Laws, 1876, p. 375.

This act, it will be noticed, also provided for the disposition of property and children, and also for the Probate Courts to punish by fine and imprisonment.

Secs. 6-8.

The act of December 30, 1852, provided that "all the courts of the Territory shall have law and equity jurisdiction, and that the mode of procedure shall be uniform in said courts."

Laws of Utah (1851 to 1870), p. 34, sec. 1.

And that every court shall preserve its papers and keep record.

Id., p. 35, sec. 9.

The act of 1855 (Judiciary) provides as follows:

Laws of Utah (1851 to 1870), p. 29.

For sessions of Probate Court.

Id., p. 31, sec. 25.

For records of Probate Court.

Id., sec. 28.

It had original jurisdiction in both civil and criminal cases, as well in chancery as at common law, and was governed in all respects as regards practice as District Courts.

Id., sec. 29.

The Probate Judge appointed his clerk to keep a record of the proceedings.

Id., secs. 32-33.

Had power to appoint referees.

Id., sec. 35.

The proceedings of Coroner or Justice of the Peace had, in inquest matters, were returnable to the Probate Court.

Laws, 1868, p. 2, sec. 17.

The civil Practice Act of 1870 (Laws, 1870, p. 17), although not expressly so stated, seems to apply to both District and Probate Courts. At the time it was enacted the act of 1855 had not been repealed or annulled, and the Probate Court is expressly included among the courts which had jurisdiction over certiorari and mandamus.

Laws, 1870, p. 95, sec. 434, p. 96, sec. 445.

See also p. 122, sec. 592.

Where title to real estate was involved in Justice

Court, the Justice must certify the same to the Probate Court, and when so certified "the Probate Court shall have over the action the same jurisdiction as if it were originally commenced therein."

Practice Act, 1870, p. 111, sec. 537.

Abstracts of judgments of Justice's Courts were filed in Probate Court, having the same effect "as if such judgment had been rendered in the Probate Court for such county."

Prace Act, 1870, p. 115, sec. 555.

Appeals from Justice's Court went to the Probate Court where they were tried anew.

Practice Act, 1870, p. 119, sec. 579, 580, et seq.

The Poland Bill (1874) divested the Probate Court of civil, chancery and criminal jurisdiction, excepting in divorce suits, and gave the District Courts concurrent jurisdiction in divorce matters.

Com. Laws, 1876, p. 53, sec 3.

Vol. 18, part 3, U. S. Stat. at Large, Chap. 469, sec. 3.

While it thus lost much of its jurisdiction, it was not reduced to an inferior court. It still remained the same Court of Record or Superior Court with complete unlimited jurisdiction over the class of subjects which were left with it. The Act of Congress even validated and

confirmed all judgments and decrees theretofore rendered by the Probate Court, thus recognizing those Courts as Courts of Record.

Com. Laws, 1876, p. 54, sec. 3.

18 U. S. Stat. at Large, sup.ra.

By the Probate act of 1876, the Probate Court is recognized as having a seal and a clerk.

Com. Laws, 1876, p. 290, sec, 48-50.

Its orders and decrees are recorded.

Id., p. 334, sec. 261.

Its writs issue under seal of the Court and are signed by the clerk; and the practice in the District Court is applicable to the Probate Court.

Id., p. 335, sec. 266-267.

All of which constituted it a Court of Record.

Vassoult vs. Austing, 36 Cal. 696.

McAulay vs. Fulton, 44 Cal. 360.

Robinson vs. Fair, 128 U. S. 87.

I. Elliott's Gen. Pr., sec. 154.

It is not contended that the Legislature by these several acts actually conferred upon the Probate Courts jurisdiction in all the matters which it attempted. Much of this legislation, doubtless, was in conflict with the organic act and other Congressional legislation; but it is instanced here simply as showing the standing and position which the Probate Court held in the eyes of the Leg-

islature; that while the Legislature did not, in so many words, say, "this Probate Court which has been established is a court of record," yet in all legislation from 1852 up to the time the decree of divorce was made, the Legislature in effect said "we are dealing with a court of record—a superior court—a court of general jurisdiction." The manner in which the Legislature, and also Congress, treated the Probate Court speaks forcibly as though, by an express statute the Legislature had said, "we have made the Probate Court a court of Record."

The Supreme Court of Utah finds from these acts, not, as is stated in appellant's brief (p. 47), that Probate Courts had common law, chancery, and criminal jurisdiction, but that "they indicate the purpose of the Legislature to treat them as courts of general jurisdiction." [Trans. bottom p. 31.]

The Probate Court having original general jurisdiction over certain subjects (instance divorce) was for that reason a Court of Record or Superior Court.

Grignon's Lessee vs. Astor, 2 How. 338-341.
Borden vs. State, 54 Am. Dec. 241-2.
Van Fleet's Collateral Attack, sec. 811.

Jurisdiction in divorce matters was conferred on the Probate Courts, concurrently with the District Courts; therefore as to divorce proceedings particularly the Probate Court must be considered a Superior Court.

Beaubin vs. Brinkenhoff, 2 Scam. (Ill.) 270-4.

Cited in People vs. Gilespie, 1 Cal. 344.

Such was the nature of Probate Courts when the divorce law was amended in 1878, under which Probate Courts retained jurisdiction in divorce suits concurrently with the District Courts; and when the decree of divorce now under consideration was rendered.

It is worthy of note that the Supreme Court of New Mexico, under its Organic Act, and Territorial legislation very similar to that of Utah, held that the Probate Courts of New Mexico are courts of record.

Bucher vs. Thompson, 7 New Mex., 115.

See also cases quoted by Judge King in his opinion. [Trans. pp. 32-33.]

The Supreme Court of Utah has ample authority for "regarding Probate Courts as courts of general jurisdiction." In fact, diligent research of counsel for appellants has failed to discover a decision to the contrary.

IV.

PRESUMPTIONS SUSTAIN THE DECREE.

Presumptions are always in favor of a court of record, and jurisdiction will not be questioned collaterally unless there is some part of the record which contradicts the presumption.

Applegate vs. Lexington Mining Co., 117 U. S., 269.

Van Fleet on Col. Attack, sec. 830-1.

Harris vs. Chipman, 9 Utah, 104.

Roach vs. Martin's Lessee, 27 Am. Dec. 756.

Hahn vs. Kelley, 34 Cal. 391.

Skinner vs. Moore, 30 Am. Dec., 158.

Voorhees vs. Bank, 10 Pet. 471-2.

Smythe vs. Henry, 41 Fed. 710.

Cuddy Petitioner, 131 U. S., 285.

Jurisdiction by constructive service is entitled to same presumptions as in the case of personal service.

1. Freeman on Judg. sec. 127.

Van Fleet on Col. Attack, sec. 834.

Essig vs. Lower, 21 N. E. Rep. 1090-2.

Stewart vs. Anderson, 70 Tex. 592.

Hahn vs. Kelley, 34 Cal. 391-417.

Applegate vs. Lexington Mining Co., Supra.

"Where there is some notice although defective, the judgment is not void; if there is notice, although irregular and defective, there is jurisdiction." [Citing a number of cases.] "The rule is the same with respect to notice by publication as to notice by service of summons. * * * It is a mistake to suppose that notice by publication is purely of statutory origin, for it was well known in chancery and at common law." [Citing cases.] "There is therefore no valid reason why the same presumptions

should not obtain in cases where the notice is by publication as where it is by service of summons, and the weight of authority is to that effect." [Citing cases.]

Quoted from an opinion by Justice Elliott.

Quarl vs. Abbott, 1 N. E. 480 (Ind.).

The statute requires, in every cause, that certain acts or facts be made a matter of record. These acts, and these only, can a Court examine in a collateral proceeding. If on such examination, it is found that the record is silent as to some act or fact so required to be made a part of the record, then in aid of the record, the law will presume that what ought to have been done was not only done, but rightly done. And the Court, in a collateral proceeding, cannot go outside of the legal record to look for evidence (that is, affidavits or orders which are not required to be filed, or the minutes of the Court, etc.) for the purpose of contradicting this presumption.

Justice Woods, in the case of Applegate vs. Lexington Mining Co. (117 U. S. 269), considering a judgment had on service by publication and which judgment made no recital as to service of summons, uses the following language: "While it must be conceded that, in order to give the Court jurisdiction over the persons of the defendants, all the steps pointed out by statute to effect constructive service on non-residents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless, indeed, the

statute expressly or by implication requires it. The Court which made the decree in the case (the record of which was under consideration) was a Court of general jurisdiction. Therefore every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction."

Indeed, appellants in the case at bar made no offer of evidence to overcome this presumption. On the contrary, they objected to the offer by Royal D. Amy (who is not a party to this appeal) of certain affidavits and the minutes of the court, made for that purpose. [Trans. pp. 14-15.]

If the offer of these papers made in this manner can now be used by appellants, it then becomes necessary to determine whether or not they are a part of the record; that is whether or not they are admissible to overcome the presumption.

V.

WHAT CONSTITUTES THE JUDGMENT ROLL?

The statute of 1876, providing for publication of summons, does not require the filing of the affidavit or order of publication, hence if there is such requirement we must look for it in some other section of the statute.

Section 1428 (p. 457, Com. Laws of Utah, 1876,) provides:

"Immediately after entering the judgment the Clerk

shall attach together and file the following papers, which shall constitute the judgment roll." The complaint, the summons, with the affidavit or proof of service, and a copy of the judgment.

It becomes important then to know what is meant by "affidavit or proof of service."

This provision was copied from California and embodied in the Practice Act of Utah passed February 17, 1870, (sec. 203) after the Supreme Court of that State had repeatedly held that "affidavit or proof of service" does not include the affidavit or order of publication of summons.

Sharp vs. Dangney, 33 Cal. 512 (decided Oct., 1867).

Hahn vs. Kelley, 34 Cal. 404 (decided Jan., 1868).

Quivey vs. Porter, 37 Cal. 464 (decided April, 1869).

Hence the statute of Utah came to us pregnant of this construction, which construction is binding on the Courts of Utah.

Suth. Stat. Con., sec. 256.

But counsel for appelants would have the courts of Utah follow the construction placed upon the California statute in Galpin vs. Page rather than that of the California courts. If Galpin vs. Page had been decided before the statute was adopted by the Utah Legislature there would be some show of reason in his contention.

We would then have the question as to whether the courts of Utah would be bound by the construction placed upon the statute by the highest court of the State from which it was adopted, or the construction thereof by the Supreme Court of the United States; but the statute was adopted after the courts of California had construed it, therefore such decisions were adopted with the statute and became a part of it as the law of Utah. When so adopted as a part of the law of Utah, it so stands unaffected by any subsequent construction of the patent statute by any other court, even the Supreme Court of California or of the United States.

Daniels vs. Clegg, 28 Mich., 44.
Attorney-General vs. Brunst, 3 Wis., 692.
Hess vs. Pegg, 7 Nev., 27.
Harrison vs. Sager, 27 Mich., 477.
Greiner vs. Klein, 28 Mich., 21.
Cooley's Const. Lim., p. 66 and note 1.

Besides the statute defined "proof of service" as follows: "In case of publication, the affidavit of the publisher, his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the postoffice, if the same shall have been deposited."

Com. Laws, 1876, p. 410, sec. 33.
(Laws of Utah, 1851-1870) Practice Act, sec. 33, p. 23.

By amendment, the affidavit and order of publica-

tion were, in 1882, required to be made a part of the judgment roll in addition to the "affidavit or proof of service."

Laws, 1882, p. 78, sec. 25.

But the latest expression of the Legislature on this point repeals the amendment and strikes the affidavit and order of publication out of the judgment roll.

Revised Stat. of Utah, 1898, sec. 3197.

Later legislation is important as showing the legislative interpretation of earlier laws.

Cope vs. Cope, 137 U. S., 688.

Being no part of the record, the Court will not look to see whether the affidavit and order of publication fulfill the requirements of law or whether they were filed or not. They will not be considered when the judgment is attacked collaterally; and cannot be used for the purpose of overcoming the presumption of regularity.

In applegate vs. Lexington Mining Co. (supra.) Justice Woods says: "The result of the authorities and what we decide is that where a Court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in by publication or other substituted service, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the Court orders such substituted service, it will be presumed in favor of the jurisdiction that ser-

vice was made as ordered although no evidence thereof appears of record, and the judgment of the Court, so far as it affects such property will be valid."

See also Hall vs. Law, 102 U. S., 463.
Harvey vs. Tyler, 2 Wall, 344.
Galpin vs. Page, 1 Saw., 321.
In re Newman, 75 Cal., 220.
Also the California cases last above cited.

In Hahn vs. Kelley (34 Cal. 404) the affidavit and order of publication were offered for the purpose of contradicting the presumption of legal service, on which judgment had been rendered, in a record being considered by the Court.

The Court says: "So, for the purpose of determining whether a want of jurisdiction is shown by the record, we can look only to the summons, the affidavit of the printer, the complaint, with the default indorsed thereon, and the judgment. The affidavit of Hawes, made for the purpose of obtaining an order for publication, and the order of the Court directing publication, for all the purposes of the question before us, must be disregarded, or in other words, presumed to have been all that the law requires."

Accordingly the Supreme Court of Utah, construing the words "affidavit or proof of service" in the light of the definition thereof given in section 33 of the Practice Act (Laws, 1876, p. 410) and of the construction placed on

these words by the Supreme Court of California and which construction was adopted by the Legislature of Utah along with the statute taken from California, held that the affidavit and order for publication are not included in the phrase "affidavit or proof of service," and therefore not a part of the judgment roll, and not to be looked to in determining whether or not the record shows jurisdiction.

They cannot be used to overthrow the presumption that serivce was had on the defendant.

However, in the case at bar, the judgment has a much stronger foundation than the bare presumption of regularity.

VI.

THE RECITAL IN THE DECREE AS TO SERVICE IS CONCLUSIVE.

Jennie Amy is not compelled to rely in this case upon presumptions to sustain the decree of divorce.

The Probate Court passed upon the evidence or proof of service, and found "that said defendant was duly served with process by publication." That finding is conclusive on collateral attack unless other parts of the record show that such finding cannot be true. This rule is particularly forceful when the attack is made in a domestic court.

In Brickhouse vs. Sutton (6 Am. St. Rep., 501), the Court says: "Every intendment is in favor of the action of the Court and its sufficiency. The ascertainment and recital of facts in the record by the Court imports verity and binding effect, and must be so treated for all proper purposes of the action, until in some proper way the action of the Court shall be successfully impeached. Thus in this case it must be taken that the Court, acting upon proper evidence, ascertained and set forth in the record the important fact that the defendants in the proceeding in question were served with the process against them—that is, served regularly, effectually."

In Goodell vs. Starr (127 Ind., 200), the Court follows Judge Elliott's decision above quoted: "The cases of Quarl vs. Abbott (Supra, and others cited) lay down that which we regard as the correct rule on that subject. When notice is given by publication the judgment of the Court acting upon such notice, that the publication and the affidavit upon which it is based, are sufficient to give it jurisdiction is conclusive upon all the parties as against a collateral attack."

In Goodwin vs. Sims (11 Am. St. Rep. 25), the Court lays down the rule as follows: "The rule deducible from these decisions is that when the Court, by the recitals of the decree, ascertains the jurisdictional fact, such adjudication is final and conclusive when the decree is collaterally assailed; and if the decree is silent, the jurisdictional fact may appear from other parts of the record.

As the entire record imports absolute verity, the recitals of the decree may be explained, limited or qualified by other parts of the record. The entire record may be looked to for the purpose of ascertaining the jurisdictional facts, when there is no finding by the Court; for jurisdiction is acquired from the facts as they appear in the entire record; but when the power to ascertain the jurisdictional fact is conferred on the Court, and the Court adjudges that it has jurisdiction, it is not overcome or destroyed because other parts of the record may not be sufficient to uphold such finding."

The opinion of the Supreme Court of Utah, and the decisions therein quoted from, are instructive on this point.

Trans. pp. 37-38-39.

The rule that recitals in the decree are conclusive on collateral attack is further shown by the following authorities:

I. Ellitt's Gen. Pr., sec. 260-261, p. 329.

1 Black. on Judg., sec. 273-4-287.

1 Freeman on Judg., sec. 126-130-2, 4th Ed.

Hall vs. Law, 102 U. S., 464.

Adams vs. Cowls, 6 Am. St. Rep., 76 (Mo.).

Kinney vs. Lewis, 2 Utah, 517.

Callen vs. Ellison, 13 Ohio St., 454.

Shawhan vs. Loffer, 24 Iowa, 226.

North Pac. Cycle Co. vs. Thomas, 38 Pac., 307.

Foster vs. Givens, 67 Fed., 691.
Dillon vs. Kan. City Ry Co., 43 Fed., 108.
Harris vs. McClanahan, 11 Lea (Tenn.), 185.
Nash vs. Church, 10 Wis., 303-312.
Sschweitman vs. Noble, 75 Iowa, 120-2.
Rotch vs. Humboldt College, 56 N. W. Rep., 658.
Blaesdell vs. Kean, 8 Nev., 308.
Davis vs. Robinson, 70 Tex., 397.
Treadway vs. Eastburn, 57 Tex., 212.
Lawler vs. White, 27 Tex., 250-5.
Waterhouse vs. Cousins, 40 Me., 333-5.
Roderigas vs. East River Sav. Inst., 63 N. Y., 460.
Betts vs. Bagley, 12 Pick., 581.
Isaacs vs. Price, 2 Dill, 351.

In a leading case (Hahn vs. Kelley, 34 Cal., 407, the Court fully and ably discusses the force to be accorded to presumptions from silence of the record as well as the effect of recitals in the decree:

"We consider the true rule to be that legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done; if the record merely shows that the summons was served on the son of the defendant, it will not be presumed that it was served on the defend-

ant. If the affidavit of the printer shows that the summons was published one month, it will not be presumed that it was published three. To avoid any misapprehension, we deem it proper to add that, so far, we have assumed, for the purpose of the argument, that the record, aside from that portion of it which is denominated the proof of service, is silent upon the question of service. But it may happen that other portions of the record may also speak upon that question. If so what they say is not to be disregarded. On the contrary, in determining the question whether a want of jurisdiction is apparent upon the face of the record, we must look to the whole of it and report the responses of all its parts. To illustrate: Suppose that portion of the judgment roll denominated the "affidavit or proof of service' shows that personal service was made upon the son of defendant, and the remainder of the roll says nothing about service. We then have a want of jurisdiction appearing upon the face of the record. But suppose the judgment states that the defendant appeared, or that personal service was made upon him, or something else that is equivalent, as it frequently does, the opposite result follows, for the record cannot lie, and it appears that the father as well as the son had been served, which may well have been the case.* * * So in the case of a service by publication, if the affidavit of the printer states that the summons was published one month, and yet the Court in its judgment states that it was published three, or that service

has been had upon the defendant, it will be presumed that other proof than that contained in the judgment roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it."

The Supreme Court of the United States states the same rule of law: "Probate Courts being then courts of superior jurisdiction in respect to the settlement, distribution and partition of estates coming within their cognizance, the recitals in the decree of partition, unless contradicted by the record, will be presumed to be correct, and every intendment will be indulged in its support."

Robinson vs. Fair, 128 U. S., 53-87.

VII.

THE AUTHORITIES CITED BY APPELLANTS ARE NOT IN CONFLICT WITH THE POSITION HEREIN MAINTAINED.

Counsel for appellants burdens his brief with authorities to the point that the defendant must be served with summons in the manner provided by law.

Respondent has no quarrel with this proposition. What I do maintain is: First—That when a judgment of a Court of general jurisdiction is attacked collaterally it is presumed, in the absence of anything appearing in the

record to the contrary, that the Court had obtained jurisdiction of the defendant. Second—That when such judgment is attack collaterally in a domestic court, a recital of service in the judgment is conclusive, unless some other part of the record contradicts the recital.

In the case at bar appellant offered no part of the record and no evidence dehors the record, even to overcome the presumption. Even if this Court could consider papers which are not a part of the record and which were excluded by the trial court on the objection of appellants and should look into all the papers pertaining to the case of Butterworth vs. Butterworth, still the recital would stand uncontradicted. They do not show that the recital was false.

Counsel for appellants quotes copiously from a number of cases on the question of presumptions, but the cases fairly considered uphold the proposition that presumptions support the jurisdiction, when the decree of the court is attacked collaterally, unless contradicted by some other part of the record. Galpin vs. Page, his leading case, holds that when the record shows that the defendant was out of the jurisdiction, the presumption ceases, but in this particular the case of Applegate vs. Lexington Mining Co., (117 U. S., 269) refuses to follow Galpin vs. Page.

I believe that none of the cases cited in appellants' brief, and that no well-considered or leading case, contradicts or varies the rule that the recital in the decree

"that said defendant was duly served with process by publication" is conclusive when attacked in a collateral proceeding in a domestic court.

In Settlemier vs. Sullivan the decree introduced in evidence was rendered in an action not in rem, but purely in personem (97 U. S. 447). The Court held that the record shows that service was made on the wife of defendant, and that there was no return that defendant could not be found to be personally served; also that the decree did not recite any facts from which any other service must be inferred. (Id. p. 449). The recital was contained in the minutes preceding the entry of judgment, (Id. p. 445), which seems to have been entered by the Clerk and not by the Court.

See also dissenting opinion.

The amount of the judgment upon which the land had been sold was insignificant as compared with the value of the property sold, so that the equities were best subserved by holding the decree void.

In Cheely vs. Clayton the decision is based on the statute of Colorado, which is very different from that of Utah, and which the highest court of Colorado had construed and held, under similar cirsumstances, that the Court acquired no jurisdiction and that the decree was void. (110 U. S. 707.) Indeed the decree then under consideration had already been passed upon by the Supreme Court of Colorado and held void (Id. p. 708). The decision was based wholly upon the construction which the high-

est Court of Colorado had given to the statute of that State (Id. p. 709) and upon its decision upon the very judgment in question (Id. p. 708). Besides it affirmatively appeared from other parts of the record that the recital in the decree as to service could not be true.

The disputants in that case in the beginning were the first and second wives of decedent, each claiming to be his widow. He had two children by his first wife, but no issue by the second. The second wife died pending the hearing in the Supreme Court, her heirs being substituted. (Id. p. 704.)

Here again we have the equities in favor of the first wife as against the collateral heirs of the second wife, and the decree accordingly held void, thus giving the property to the first wife.

Galpin vs. Page is not applicable to the case at bar. In the first place the decree introduced in that case had been reversed by the Supreme Court of California on the ground that the service was not sufficient (18 Wall 355) to give jurisdiction. This was held conclusive and the Supreme Court of the United States refused to consider facts as to service (p. 365-373). The decree would still have been held good as to the rights of third parties having equitable interests); thus showing that the Court treated it, in fact, as only voidable (Id. p. 373-4).

The proceeding in which the decree was had was not treated as a proceeding in rem, otherwise the presumption would have been in favor of the decree. (Id. p. 371).

The decree in that case did not find (as the decree in the case at bar, viz. Butterworth vs. Butterworth), that service was duly had. If it had affirmatively appeared from some part of the record by proper averment, the decree would not have been deemed void. (Id. p 366.)

The action was between citizens of different States, and therefore the judgment was not deemed that of a domestic court.

To have held that decree valid would have deprived a party, who was a minor at the time service was had, of his inheritance, so that the equities were upheld by holding the decree void.

Thompson vs. Whitman, considers a judgment which was rendered in a special proceeding as well as in a foreign State and the cases cited therein seem to have been treating of judgments rendered in foreign States.

In Noble vs. Union River Logging Ry., the question of the effect of recitals in the decree was in no way before the Court, it was a question of the effect of presumptions merely, and so in the case of Guaranty Trust Co. vs. Green Cane Ry.

Graham vs. Spencer and also Walbur vs. Abbott considered judgments which contain no recital; and Cissell vs. Palaski considered a judgment rendered in a special proceeding; so in Martin vs. Barbour, and in passing on the validity of a tax sale at that.

Romain vs. Union etc. Co. was a direct proceeding.

In re Sawyer the question of service of process was

not before the Court; so in Ellitt vs. Piersoll; so in Hickey's lessee vs. Stewart.

In the case of Gray vs. Larimore the judgment which was being considered contained no recital as to service. So in the case of Noves vs. Butler.

As to the early California cases cited, those in the 12 Cal., 100, and 26 Cal., 149, do not pass on the question of recital; while the case of Steinbeck vs. Leese was considered by the Court, and the case of Forbes vs. Hyde was expressly overruled by Hahn vs. Kelly on the ground that the question of the affidavit and order for publication not being a part of the record was not called to the attention of the Court, and that therefore the Court had not considered the matter in deciding that case.

The authorities, particularly the Supreme Court of the United States, justify the position that the Court will not be over-zealous to hold a divorce proceeding void where all the equities are on the side of the widow, Jennie Amy, as against remote relatives of decedent.

VIII.

ALL THE PROCEEDINGS CONSIDERED, WHETHER IN THE RECORD OR DE HORS THE RECORD, STILL THE DECREE IS VALID AS AGAINST COLLATERAL ATTACK.

Jennie Amy offered the complaint and the decree

which contained the recital as to service. These in themselves were sufficient to establish the divorce. In addition to this she offered a copy of the summons as published in the newspaper, the original not having been found among the files in said case. She also showed by testimony that a summons was issued, and that the defendant received the summons through the mails as well as six copies of said newspaper containing publication of summons in said case.

This evidence was admissible as showing that the steps pointed out by the statue were followed.

Applegate vs. Lexington Mining Co., 117 U. S. 268.

Even if the Court in the case at bar could go outside of the judgment roll, and back of the finding of the Probate Court, "that said defendant was duly served with process by publication," for the purpose of considering the alleged irregularities in the service of summons, and could consider papers which were excluded from the record in this case on the objection of appellants when the same were offered by Royal D. Amy, who is not a party to this appeal, it would still find that the alleged irregularities are not such as to render the decree void. They are matters which can only, if at all, be attacked in a direct proceeding brought for that purpose.

The sufficiency of the affidavit for service of summons by publication was a matter to be determined by the Court.

Com. Laws 1876, p. 409, sec. 30.

And such determination is conclusive when attacked collaterally.

Pennoyer vs. Neff, 95 U. S. 721.

Pettiford vs. Zoellner, 45 Mich. 362.

The summons and order for publication and affidavit of publication of summons which do not appear among the files are presumed to have been lost, and to have been regular in form.

Freeman on Void Judicial Sales, sec. 8, p. 17.

Hurley vs. Barnard, 48 Tex. 83-87.

Wilson vs. Holt, 83 Ala. 540.

The sufficiency of the affidavit of the printer as to publication of summons and of the affidavit of mailing summons, which was offered by Royal D. Amy, (Trans., p. 17) cannot be questioned collaterally; for the Statute of Utah provides, that from the time service is had, the Court acquires jurisdiction, and has control of all subsequent proceedings.

Com. Laws 1876, p. 411, sec. 35.

It is the fact of service, not the proof which gives the Court jurisdiction.

Wood vs. Blythe, 46 Wis. 655.

Kipp vs. Fullerton,4 Minn. 480.

Pierce vs. Butlers, 21 Kans. 106.

In Re Newman, 75 Cal. 220.

Fanning vs. Krapfl, 68 Iowa 248.

The Court has power to order amendment of proof of service.

Freeman on Judg., sec. 127, (last paragraph).

Therefore the Court must have jurisdiction of the cause.

So that considering all the proceedings in the divorce case in the Probate Court, whether a part of the record or not, and whether in evidence in the case at bar or not, nothing is found which contradicts or is inconsistent with the recital in the decree "that said defendant was duly served with process by publication."

IX.

COLLATERAL ATTACK IS NOT FAVORED.

Collateral attacks on Judicial proceedings are never favored, and unless it is conclusively shown that the Court had not jurisdiction, or that it transcended its jurisdiction, its judgment will be held to be valid.

Head vs. Daniels, 38 Kans. 12.

Particularly is this the rule where the equities of the case are all on the side of the party attempting to sustain the decree. When such is the case, a most liberal construction will be given in favor of the decree.

Ogden vs. Walters, 12 Kans. 235.

Gunnell vs. Rice, 13 Minn. 406.

X.

THE COURTS UPHOLD DECREES OF DIVORCE.

The subject matter in suit for divorce is the status of the party domiciled within the jurisdiction of the Court.

11 Bish. Marriage, D. & S., Chap. VI., with note to sec. 152.

11 Black on Judg., sec. 925-931-2.

As domicile is what confers jurisdiction in divorce, it matters not, in adjudicating the status, whether the defendant has notice of the proceedings or not, unless a notice is prescribed by statute.

11 Bish. M. D. & S., sec. 76-138-157.

Maynard vs. Hill, 125 U. S. 209.

Pennoyer vs. Neff, 95 U. S. 734.

Thus the law makes a distinction between jurisdiction of the status, and jurisdiction of the party defendant; and even in the case of foreign judgments, while a recital in the record as to domicile is not conclusive, yet a recital as to service of notice is conclusive.

11 Bish. M. D. & S., sec. 184.

Wallace vs. Brown, 76 Am. Dec. 425 (Ark.).

See also Borden vs. State, 54 Am. Dec. 242.

Hence, we find the decisions almost uniform in upholding decrees of divorce when the Court had jurisdiction of the subject matter, even though the service of process was very irregular.

Butterworth himself could not question the validity of the divorce at this late day.

Crosby vs. Probate Court, 3 Utah 52.
Vorhees vs. Bank, 10 Pet. 472.

By his second marriage and long acquiescence he has affirmed and validated the decree even if it were invalid when rendered.

Reno on non-Residents, p. 317-8.
Loud vs. Loud, 129 Mass. 18.
Colton vs. Rupert, 60 Mich. 329.
Dunn vs. Dunn, 4 Paige 430.
Singer vs. Singer, 41 Barb. 140.
Nichols vs. Nichols, 25 N. J., Eq. 65.

By action brought within reasonable time he might have attacked the decree, only by direct proceedings for that purpose.

Hendrick vs. Wittemore, 105 Mass. 26.
Henderson vs. Standford, Id. 506.

And the plaintiff cannot impeach the judgment after obtaining the decree.

Hendrick vs. Whittemore, Supra.
Henderson vs. Stanford, Supra.

Lapham vs. Briggs, 27 Vt. 35.

Ellis vs. White, 61 Iowa 646.

That is, Mrs. Amy could not now claim to be the wife of Butterworth, nor could Butterworth claim to be her husband. A husband without a wife, or a wife without a husband does not exist in reason or law.

1 Bish. M. D. & S., sec. 698 et seq. 837.

11 Bish. Id., sec. 137-153-154.

Richardson vs. Simons, 47 Mo. 26.

Marriam vs. Wolcott, 61 How. Pr. 393.

Can a stranger to the record now be heard to say that Mrs. Amy and Elliot Butterworth are husband and wife?

Skinner vs. Moore, 30 Am., Dec. 157.

Is their status that of single man and woman so far as they themselves are concerned, but that of husband and wife so far as third parties are concerned? Do irregularities, the carelessness of some attorney, or the Clerk of some Court, so juggle with the law as to deprive them of the right of inheritance from each other, because neither one can claim to be the spouse of the other; and at the same time deprive them of the right of inheritance from others, because some third party can claim that they are husband and wife? Will the law bastardize the children of Butterworth, the issue of his second marriage? To prevent just such manifest injustice we find

the Courts more liberal in sustaining decrees of divorce than in other cases.

After great lapse of time any reasonable presumption of fact will be conclusively indulged in order to sustain a decree of divorce.

Wilson vs. Holt, 83 Ala. 540.

1 Bish. M. D. & S., sec. 77, 956-8, 1148-9.

Reasons of public policy favor the upholding of the validity of divorce where there is subsequent marriage of the parties.

1 Bish. M. D. & S., sec. 1148.

Wilson vs. Holt, Supra.

Maynard vs. Hill, 125 U. S. 204-8.

XI.

THE BARE PUBLICATION OF SUMMONS FULFILLED ALL THE REQUIREMENTS OF THE LAW.

The Statute of Utah in force at the time the decree was rendered provided two methods of getting substituted service on a non-resident defendant. One by publication of summons by the order of Court made on affidavit. The other mode, by publication of a notice, no affidavit or order being required. Such notice was required to be made in a newspaper printed in and having a gener-

al circulation in the Territory, and to be inserted four times consecutively, the first insertion to be at least forty days before the time to answer, and a copy to be immediately mailed to the defendant. The act of February 19, 1869 (Laws of Utah 1869, p. 19) provides; sec. 4: "If any defendant is a non-resident of the Territory, and has an agent in the Territory, service may be had upon him, by serving the same upon his agent, or by leaving a copy thereof at his usual place of business, with any person in charge thereof. Where any defendant is a non-resident, or his residence is unknown, and has no known agent or place of business in this Territory, service of process may be had by publication in some newspaper printed in and having a general circulation in said Territory. Said publication must contain the names of the parties, plaintiff and defendant, to the complaint; a statement of the object thereof, the name and style of the court in which the same is filed, and also notify the persons thus to be served, when they are required to answer. Said publication shall be inserted four times consecutively; the first insertion to be at least forty days before the time of answer, and a copy of which shall be immediately deposited (post paid) in the postoffice, directed to the defendant or defendants at their last known place of residence or business."

The State of Nevada had a different method of getting constructive service.

The Legislature of Utah, in formulating the Practice Act of 1870, ingrafted the Nevada statute on the

existing statute of Utah above quoted. Immediately preceeding the Utah Statute of 1869, they joined the following portion of the Nevada law: "When the person on whom the service is to be made resides out of the Territory, or has departed from the Territory, or cannot after due diligence be found within the Territory, or conceals himself to avoid the service of summons, or being a corporation or joint stock association, cannot be served as provided in sec. 29, and the fact shall appear by affidavit to the satisfaction of the Court or Judge thereof, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such Court or Judge may grant an order that the service be made by publication of the summons. The order shall direct the publication to be made in a newspaper to be designated as most likely to give notice to the persons to be served."

Laws of Utah 1870, p. 22. (Practice Act.)

Com. Laws 1876, p. 409, sec. 30.

And first sentence of sec. 31.

Immediately succeeding the Utah Statute of 1869 they joined the following portion of the Nevada law: "In actions upon contracts for the direct payment of money, the Court in its discretion may, instead of ordering publication, or may after publication, appoint an attorney to appear for the non-resident, absent or concealed de-

fendant, to conduct the proceedings on his part."

Id. last sentence of sec. 31.

Thus the Legislature retained the method by publication of notice, without an affidavit and order, and adopted the additional methods from Nevada, of publication of the summons by order of the Court, and of the appointment of an attorney to represent the defendant, in which case no publication need be made. In case the Court ordered publication, no mailing of the copy to the defendant was required; but in case a notice was published without an order of Court then a copy must be mailed to the defendant. Sec. 33 of the Practice Act recognizes the fact that the summons need not be mailed in all cases.

Sec. 33. "Proof of the service of summons shall be as follows: First. * * * Second. In case of publication, the affidavit of the publisher, his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the postoffice, if the same shall have been deposited." * * *

The intention of the Legislature by these amendments was clearly to provide for cases not within the act of 1869, and to provide other and additional modes of acquirising jurisdiction without repealing or modifying the mode which was provided by act of 1869.

The Statute of 1869, in the case at bar, has been more than complied with. It did not require the issuing

of a summons even; all that was required was the publication of a notice four times—the first publication to be at least forty days before the time for answer—and the mailing of a copy to the defendant. In this case the summons itself was published, which was sufficient as a notice under the Statute.

The Legislature can provide for the giving of notice in whatsoever manner it sees fit.

II. Bish. M. D. & S., sec. 141.

See Maynard vs. Hill and Pennoyer vs. Neff, Supra.

XII.

APPELLANTS' BRIEF MISINTERPRETS THE OPINION OF THE SUPREME COURT OF UTAH.

Counsel for appellants, in his brief, shows great agility in demolishing numerous men of straw which his imagination espys in Judge King's opinion in this case.

Some of the more important points wherein he misinterprets the language of the Court may be worthy of notice.

The Court does not decide, as stated in appellant's brief (p. 13), that a defective record can be cured by oral testimony; nor that a recital of service is conclusive although such recital is disputed by the record.

Nor does the Court decide, as stated on page 14 of brief, that an order for publication and affidavit of the printer are not necessary. Yet if the Court had found that the publication could be made without an affidavit or order of Court therefor, such finding would have been in harmony with the Statute of 1869 above quoted.

Nor does the Court recognize any defect in the judgment when it comments on the parol evidence offered by Jennie Amy. While the Court will presume (if a summons is held to be necessary) that a summons was duly issued, the record being silent; yet it does not follow that the Court will exclude secondary evidence, that is, a copy of the summons, to supply that which is lacking in the record.

Lowry vs. Cady, 4 Vt. 505.

Applegate vs. Lexington Mining Co., Supra 268.

The testimony of Butterworth was admissible to show that he had notice of the pendency of the divorce, and that he acquiesced in, and assumed a new status relying upon the decree; and also to show that the summons was published.

The assignment of errors also designates that as error wherein the Court is not guilty. The Court did not, as specified in assignment No. 13, throw the burden on appellants to show that the divorce is void.

The Court did not, as assigned in No. 19, admit Royal D. Amy's "exhibit 4." This offer was excluded on objec-

tion of Mr. Young. Notwithstanding this fact, he now relies upon it as his only evidence to impeach the decree, and in the face of such reliance complains because, as he alleges, it was admitted.

As hereinbefore stated the Court did not hold that an order of publication is unnecessary; nor that the Probate Court ever possessed common-law or chancery jurisdiction. (See Assignments 21-23 appellants' brief, p. 17.)

There is nothing in the record, nor was there any evidence offered tending to show, nor did the Clerk of the Probate Court certify that there never was an order for publication of summons, although this is broadly stated in appellants' brief, p. 21-37.

In the certificate to "Royal D. Amy's exhibit 4," which was excluded on objection of Mr. Young, the Clerk certifices that said exhibit contains the "whole record in said cause," and "that the foregoing are all the papers which are filed in said cause." (Trans., p. 19.) This exhibit does not contain any order for publication. Presumably this is the foundation for Mr. Young's bold statement that there never was an order and that the Clerk so certifies.

Again appellants' brief (p. 45) puts the Supreme Court of Utah in the position of holding that a recital of service in the decree cannot be questioned collaterally under any circumstances. The holding of the court is very plainly and tersely stated in the opinion (Trans., p. 44), as follows: "Accordingly we are of the opinion that

the affidavit upon application for order of publication and the order based thereon, under the Compiled Laws of 1876, are not a part of the record, and their existence or non-existence cannot be appealed to in this collateral attack to impeach the verity of the record; that the recital of service of process not being contradicted by anything appearing in the judgment-roll, the presumption is that the Court acquired jurisdiction of the defendant, and in this collateral proceeding the decree of divorce there rendered is unassailable and conclusive."

We respectfully submit that the Supreme Court of Utah has stated the law as it is, and as in reason, and in justice to the widow of decedent, it ought to be.

C. S VARIAN,
Attorney for Respondent.

W. H. DICKSON,
S. P. ARMSTRONG,
Of Counsel.

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YOUNG *v.* AMY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 242. Submitted April 27, 1898. — Decided May 31, 1898.

On error or appeal to the Supreme Court of a Territory, this court is without power to re-examine the facts, and is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admission or rejection of testimony when the action of the court in this respect has been duly excepted to, and the right to attack the same preserved on the record.

There is no error in the conclusions of law in this case: all the assignments of error, and the argument based thereon, rest on the assumption that the findings of fact certified by the court below are not conclusive, and that this court has the power, in order to pass upon the questions raised, to examine the weight of the evidence, and to disregard the facts as found.

THE case is stated in the opinion.

Mr. Le Grand Young for appellants.

Mr. C. S. Varian, *Mr. W. H. Dickson* and *Mr. S. P. Armstrong* for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

By section 17 of the act of Congress of July 16, 1894, c. 138, providing for the admission of Utah into the Union, 28

Stat. 107, c. 138, power was conferred upon the convention, called for the purpose of framing a constitution for the contemplated State, to provide for a transfer of causes which might be pending in the territorial courts, at the time of the admission of Utah into the Union, to the courts of the State which were to be established. The statute moreover provided that "from all judgments and decrees of the Supreme Court of the Territory mentioned in this act, in any case arising within the limits of the proposed State prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union."

This cause comes here for review in virtue of the foregoing provisions of law. It originated in the probate court of Summit County, Utah Territory, and involved a dispute over the distribution of the estate of Oscar A. Amy, who died intestate in the county of Summit, in Utah Territory, on the 26th day of May, 1891. There were three classes of claimants to the estate. First, Adelia Young, Cedina C. Young and Delecto Maston, who were maternal aunts of the decedent, they being the appellants on this record. Second, Royal D. Amy, Francis R. Jackson and others, half blood brothers and sisters of the deceased. Third, Jennie Amy, who is the appellee, claiming to be the wife of the deceased. Each of these different classes of claimants asserted that they were solely entitled to take distribution of the estate to the entire exclusion of the others. In the probate court a decree was rendered in favor of the first-mentioned persons, the maternal aunts. From this decree an appeal was taken to the District Court of the third judicial district of the Territory of Utah, where after a trial *de novo* the decree of the probate court was affirmed. From this decree further appeal was prosecuted to the Supreme Court of the Territory, and that court reversed the decree of the District Court, rejected the claims of those firstly and secondly mentioned; that is, the maternal aunts and the brothers and sisters of the half blood, the court deciding that the wife of the deceased, Jennie Amy, was solely entitled to the entire

estate. The decree of the Supreme Court of the Territory was entered on December 21, 1895. 12 Utah, 278. On the same day the maternal aunts who were embraced in the first class applied for and were allowed an appeal to this court, and on December 21, 1895, a bond for costs was filed in the Supreme Court of the Territory, and was approved by the Chief Justice thereof. The citation on appeal, however, was not issued until about six months thereafter, September 21, 1896. As in the meanwhile, the State of Utah had been admitted into the Union, this citation was approved by the Chief Justice of the State of Utah, and on the same day findings of fact and conclusions of law were made by the Supreme Court. These findings, as the record certifies, were prepared by the late Chief Justice of the territorial court, and were adopted by the Supreme Court of the State of Utah as its own. From the findings thus made we have ascertained the facts above stated, and the findings moreover show that the controversy involved two issues. First, whether the brothers and sisters of the half blood were entitled to a distribution of the property left by the deceased in preference to the maternal aunts; and, second, whether Jennie Amy, the appellee, was the wife of the decedent, it being conceded that if she was his wife under the laws of Utah, she inherited the property left for distribution to the exclusion of his maternal aunts. The first question, that is, the right to distribution asserted in favor of the brothers and sisters of the half blood, may be at once dismissed from view, as the decree of the Supreme Court rejected their claim, and they have not appealed. The second question, that is, whether Jennie Amy, the appellee, was the wife of the deceased, depended upon the validity of a judgment of divorce, against a former husband which had been rendered in her favor in 1879 in the probate court of Washington County, Utah, the marriage having been contracted in Utah and the ground for the divorce being the abandonment of the wife by the husband. After this judgment of divorce Mrs. Amy on the 4th of August, 1886, was married to Oscar A. Amy, the deceased. The controversy, then, between the parties now before us turned upon a claim advanced by the maternal

aunts, that the judgment of divorce rendered between Mrs. Amy and her former hubsand was void; that she hence did not enter into a lawful marriage with the deceased, and was not entitled, therefore, as his wife to his estate.

The record contains, as we have stated, findings of fact made by the Supreme Court of the State and the conclusions of law, which the Supreme Court held to be decisive of the issues which the case involved, and to which we shall have occasion hereafter to refer. The findings of fact and conclusions of law are immediately followed in the record by this recital: "The foregoing is a statement of the facts found upon the evidence in the case, and the following are the rulings of the court on the admission and rejection of the evidence, which were duly excepted to by counsel for Adelia Young, Cedina C. Young and Delecto Maston." This is followed by a note of evidence, showing what took place during the trial in the District Court, which is also supplemented by the oral and documentary evidence offered in the trial of the cause. It appears that Mrs. Amy offered the decree of divorce between herself and her husband and the complaint filed in the suit in which the judgment of divorce was entered. This was objected to on the ground that the documents were irrelevant, inasmuch as without the summons issued in the cause they proved nothing. The counsel tendering the proof thereupon declared that although the decree on its face recited the fact that the summons had been regularly issued and served, it was absent from the record, and he proposed by further evidence to show that the summons was regularly issued and due notice thereof had been given to the defendant as the law required.

The court received the evidence subject to the objection. That is to say, it declared that it would pass on the objection when all the evidence in the case had been offered, thus treating the objection as in a measure going to the effect. Mrs. Amy and her former husband, the defendant in the divorce proceedings, were then called, and testimony was given by both tending to show that the summons had been issued in conformity to law and the defendant in the divorce

suit was personally cognizant of the suit, as he received and had in his possession the copies of the newspaper containing the published summons, and that due service thereof, in the manner required by law, had been made. All this testimony was objected to, and the court likewise received it subject to objection, no exception being taken to such action. In the course of the testimony of these witnesses various exhibits were offered tending to show the preparation of the summons in compliance with law, the publication in the newspaper of the summons in conformity to legal requirements, its service on the defendant and that he had both legal and actual notice of the suit, a l of which was objected to, and this, like the other objections, was reserved to be considered when the evidence was all in. The counsel of Royal D. Amy and others, the sisters and brothers of the half blood, offered in evidence what they designated as the judgment roll of the divorce proceeding. This was also objected to by the counsel for the maternal aunts on the ground that the record was not complete and did not show compliance with the legal requisites, and was objected to by Mrs. Amy because it contained matters asserted not to be properly a part of the judgment roll, and which were therefore not admissible. The court also reserved the objection to this evidence.

At the conclusion of the trial the court sustained all the objections to the evidence and the testimony, and decided the case against Mrs. Amy and in favor of the maternal aunts. To the rulings of the court rejecting the documentary and oral evidence, Mrs. Amy excepted, and upon the record as thus made the case was taken to the Supreme Court of the Territory. In that court, as we have seen, the action of the trial court was reversed and a decree rendered in favor of Mrs. Amy.

The assignments of error are twenty-four in number, and the argument by which their correctness is sought to be maintained has taken a much wider range than the condition of the record justifies. It is settled that on error or appeal to the Supreme Court of a Territory this court is without power to reëxamine the facts and is confined to determining

whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admission or rejection of testimony when the action of the court in this regard has been duly excepted to, and the right to attack the same preserved on the record. *Harrison* v. *Perea*, 168 U. S. 311, and authorities there cited.

The findings of fact and conclusions of law of the Supreme Court are as follows:

"Eleventh. The court further finds that the said Jennie Amy was married to one Elliot Butterworth in 1875.

"That on the third day of September, 1879, the probate court of Washington County made and entered a decree of divorce, dissolving the bonds of matrimony theretofore existing between the said Jennie Amy and the said Elliot Butterworth, and absolutely releasing the said Jennie Amy and the said Elliot Butterworth from all the obligations of said marriage; that the said probate court so granting said decree of divorce was a court of competent jurisdiction and had jurisdiction of the subject-matter of said divorce action and of both the parties thereto.

"That the said defendant therein, Elliot Butterworth, had knowledge at the time of the said divorce proceedings and was duly served with process in said action.

"That the said Elliot Butterworth married a second wife on the 11th day of October, 1880, being the year after said decree of divorce was rendered; that his second wife is still living, and she and the said Elliot Butterworth are still husband and wife; that as the issue of said second marriage the said Elliot Butterworth and his present wife have seven children, ranging from two years to fifteen years old.

"That afterwards, to wit, on April 4, 1886, the said Jennie Amy, the claimant in this proceeding to the estate of the said Oscar A. Amy, deceased, was duly and lawfully married to the said Oscar A. Amy, and continued to be and was his lawful wife at the time of his death."

From these findings it deduced the following legal conclusion:

"That the said Jennie Amy is now the widow of said Oscar A. Amy, deceased, and as such widow she is the successor to the whole of his estate, consisting of the property hereinabove described."

We will consider the assignments in their logical order. The first to the eleventh, inclusive, and the nineteenth complain of errors, which it is alleged the Supreme Court committed in admitting certain evidence. But all the evidence objected to was received by the trial court subject to the objection, and the question of its admissibility turned on that of its irrelevancy or the quantum of proof which it would establish if considered. The ultimate action of the trial court in rejecting the evidence which it had received, subject to objection, amounted, in effect, to a decision that the evidence did not establish that the judgment in the divorce proceedings had been rendered after due publication of summons in accordance with the laws of the Territory, and therefore the evidence was insufficient. But the express finding from all the evidence by the Supreme Court of the State is that the summons in the divorce suit was duly issued and published according to law, and that the defendant had, besides, personal notice of the pendency of the suit. This conclusion being binding on us, establishes that the evidence was relevant and material, and that there was no ground to reject it. We cannot, therefore, say that the evidence should have been disregarded, because it did not establish the facts, which we are bound to conclude it did fully prove. If specific findings of each item of evidence and the conclusions deduced from the separate items had been made, as in *Cheely* v. *Clayton*, 110 U. S. 701, the case would present a different aspect. Considering, however, the state of the record and the nature of the findings of fact certified, we cannot determine the correctness of the objections to the evidence without going into its weight and making independent conclusions of fact; in other words, without disregarding the findings made by the court below, by which we are concluded. The same reasoning is applicable to the other assignments of error. Thus, the thirteenth, fourteenth, seventeenth and eighteenth assert that the court erred in

holding, as to the burden of proof, that it erroneously treated the denial of the validity of the judgment of divorce by the maternal aunts as a collateral attack by them on such judgment. But there are no findings which raise these questions. On the contrary, the facts found render them wholly immaterial, for it is obvious that if the evidence affirmatively established, as the findings declare, that the judgment of divorce was rendered after due summons, and that the defendant had personal notice of the proceedings, the question of burden of proof and collateral attack are wholly irrelevant. Again, the twenty-first and twenty-second assignments of error complain that the court erred in holding that it was not necessary that there should be an order of the court directing the publication of the summons in the divorce proceeding, and that the court erred in holding that the only papers necessary in proof of publication were the complaint, summons and affidavit of the printer and judgment. But there are no findings which raise these questions. On the contrary, the facts found are that the summons was duly published, and that the defendant had besides personal notice. To maintain the assignments of error, we should be obliged to go into the record and ascertain what was the proof on the subject upon which the court based its findings, and deduce from this analysis that the premise upon which the assignments just mentioned are based was a correct one. The same reasoning applies to the twenty-third and twenty-fourth assignments, which charge that the court erred in holding that the probate court by which the divorce judgment was rendered possessed common law or chancery jurisdiction, or that it was ever a court of general jurisdiction. These questions become only material for the purpose of determining the *prima facie* proof resulting from the record of the divorce proceeding. It is not questioned that it was correctly held that the court which rendered the judgment of divorce had jurisdiction of the subject-matter. If, therefore, it had jurisdiction, and the proof affirmatively shows the regularity and validity of the proceedings, it is wholly immaterial to determine whether it possessed common law or chancery powers, or was a court of general jurisdiction.

Syllabus.

In effect, all the assignments of error and the argument based thereon rest in reason on the assumption that the findings of fact certified by the court below are not conclusive, and that this court has the power, in order to pass upon the questions raised, to examine the weight of the evidence and disregard the facts as found. If the argument be that the findings of fact are the mere statement of ultimate legal propositions, and therefore they may be disregarded or reviewed, then the result of the contention is that there are no findings of fact and nothing to review, and if the other aspect be looked at, the views which we have just expressed are conclusive.

Affirmed.